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Getting the Faith: Why Business Lawyers and Executives Believe in Mediation

John Lande†

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I. INTRODUCTION

Do you believe in mediation?¹ That may seem like an odd question. Normally one thinks of "believing in" (or having faith in) things

1. In mediation, mediators help the disputants (and, if applicable, their attorneys) reach agreement. Although there are considerable variations in mediation practice, see John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 848-54 (1997), there are some distinctive generally-recognized features, as these procedures are typically practiced in the U.S. these days. The process often involves an issue-by-issue discussion directed by the mediator. If the parties do not agree, mediators do not have formal authority to impose a resolution. Thus there is no guarantee that a dispute will be resolved through mediation. The formal features of parties' active participation and consent give mediation an aura of party control. Some observers challenge the notion of party control in actual practice and suggest that mediators sometimes or often use subtle or not so subtle manipulation. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1585-94 (1991); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 L. & SOC'Y REV. 613 (1989); Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 459-60 (Deborah M. Kolb ed., 1994).

like magic, God, or the market. These are typically things that are beyond verifiable human knowledge (such as magic and God) and/or deeply held values (such as whether the market is a better mechanism than government for managing the flow of goods and services). At first blush, one might not think that mediation would fall into either category. There have been numerous empirical studies about many different aspects of mediation, so one can confidently say, for example, that mediation participants generally perceive that the process and outcomes of mediation are fair and generally are satisfied with the process.²

I suspect that for most people, belief in mediation refers to the *value* of mediation as a dispute resolution technique (particularly in comparison with the value of litigation). Belief in mediation, then, may be like belief in the market. There is an immense amount of research on the functioning of the market, yet experts sharply disagree in their interpretations and predictions about how it functions, not to mention the relative values of market and government systems of economic management. There is such complexity and scope of extraneous variables affecting both mediation and economic systems that presumably no amount of empirical research would ever settle these debates. For many people, such beliefs may become matters of faith, i.e., deeply-held convictions that are largely impervious to careful analysis of evidence.³ I suggest that they are ideologies based on faith to a considerable extent. Indeed, understanding belief in mediation by many people is likely to require one to transcend assumptions

Disputants may undertake mediation by contract, either when entering a transaction (e.g., by a clause in a contract providing for mediation in the event of a dispute) or after a dispute arises. In addition, courts are requiring parties increasingly to use mediation before they can get a court trial. Court planners often develop these "court-annexed" mediation programs intending to reduce courts' caseloads, backlog of cases, and operating costs. These programs are also often suggested to reduce litigants' time and expense and increase their satisfaction. See generally ELIZABETH PLAFINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (1992).

2. See Craig McEwen, Note on Mediation Research, in DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 182-83 (Stephen B. Goldberg et al. 3d ed. 1999); John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DEN. U. L. REV. 499, 529, 532-33 (1989).

3. One definition of faith is "complete confidence or trust." WEBSTER'S DESK DICTIONARY OF THE ENGLISH LANGUAGE 322 (1990). This is not intended to imply that belief based on empirical analysis is necessarily superior to that based on faith or other epistemologies.

that it is simply based on cool analysis of advantages and disadvantages. This study is intended to examine a wide range of factors that give rise to (or at least relate to) belief in mediation.⁴

In the 1980s and 1990s, ADR⁵ in general, and mediation in particular,⁶ became things that people do (or don't) believe in on a technical and, especially, ideological level. Proponents believe that "it" "works" and it is good.⁷ Indeed, there are "true believers" who profess

4. This research cannot give rise to strong claims of causality of belief in mediation, though the results are certainly suggestive about causal factors. For discussion of limits of causal interpretation of these results, see *infra* Part VI.

5. The term "ADR" probably did not even exist in the late 1970s. By the late 1980s, the term had become so widely accepted that it seemed too late to change it despite dissatisfaction with it by many people in the dispute resolution world. See Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U. L. REV. 335, 342-45 (1989); Madeleine Crohn, *Alternative Dispute Resolution: Buzzwords or Movement?*, 51 TEX. B. J. 1143, 1144 (1988). The acronym "ADR" originally stood for "alternative dispute resolution," referring to dispute resolution procedures that were alternatives to litigation. In recent years, some people have used the term to mean "appropriate dispute resolution," suggesting either that non-litigation procedures are presumptively most appropriate or that decision-makers should be given a choice of procedures from which to select the most appropriate one for particular cases. Some have used the term referring to assisted or affordable dispute resolution. See Archie Zariski, *Lawyers and Dispute Resolution: What Do They Think And Know (And Think They Know)? - Finding Out Through Survey Research*, 4 E Law - Murdoch University Electronic Journal of Law (June 1997) (visited Mar. 23, 2000) <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>> (survey of 418 attorneys in Western Australia with 16% response rate). Some prefer simply to use the term "dispute resolution," referring to all dispute resolution procedures, including litigation. While these distinctions are quite meaningful in some contexts, as a practical matter, whatever the definition, the term "ADR" is generally used to refer to a set of dispute resolution procedures, principally including mediation and arbitration, though also including a wide range of other procedures such as early neutral evaluation, summary jury trials, and ombuds work. See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (3d ed. 1999). For the purpose of this Article, the precise meaning of ADR is not as significant as the fact that the term has a widely accepted meaning and that people commonly identify as believing in it or not.

6. While arbitration has predominated in the ADR field in the U.S. for much of the twentieth century, there has been increasing interest in mediation in recent decades. This is reflected by references to mediation by commentators as the "rising star in the ADR galaxy." Ellen E. Deason, *Allerton House Conference '98: Confronting and Embracing Changes in the Practice of Law*, 86 ILL. B.J. 628, 632 (1998). While this quote may well reflect the current relative ideological popularity of mediation, I suspect that arbitration may still be used more frequently, partly because of its longer history of institutionalization in certain sectors such as construction and unionized labor grievances.

7. See, e.g., Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991); Andrew W.

their faith in it and proselytize at professional gatherings.⁸ Opponents sometimes challenge claims about how well it works or argue that, even if it does “work” in some respects, it produces adverse side-effects that outweigh any benefits.⁹ Thus, it has become perfectly normal to state (or ask) whether one is a believer in ADR or mediation. This is captured quite well in the following excerpt from an interview with a lawyer for this study:

My experience has been, for example, with large corporations, in-house legal departments have sort of gotten the word that “ADR is something we need to think about. It’s important.” So one of the things people are always asking your firm is, “What experience do you have in ADR? Are you believers in ADR?”¹⁰

Arguments about mediation (and ADR generally) have been carried out in the scholarly and professional literature by scholars and professional opinion leaders.¹¹ Similar, but perhaps briefer, conversations play out in circles of regular dispute handlers such as lawyers and business executives. Some people are quite enthusiastic and “talk it up,” encouraging others to use it more in their own cases. Other people have reservations about using ADR procedures and may criticize the procedures or discourage using them in particular cases.

Why do some people become believers in mediation and others do not? This article presents the results of a study addressing that question, particularly for those who handle disputes rather than those

McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Janice A. Roehl & Royer F. Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161 (1985); Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 10 L. & SOC’Y REV. 675 (1975).

8. See *infra* text accompanying notes 225-27.

9. See, e.g., Grillo, *supra* note 1; Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995); Austin Sarat, *Alternative Dispute Resolution: Wrong Solution, Wrong Problem*, 37 PROC. ACAD. POL. SCI. 162 (1988); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Richard Delgado et al., *Fairness and Informality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (1985); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

10. Interview with outside counsel 4 (Mar. 18, 1994). See *infra* Part III for a description of the methodology of this study.

I frequently hear professions of belief in mediation when I talk with people who, knowing of my interest in mediation, often express their belief in (or occasionally doubts about) mediation.

11. See *supra* notes 7-8, which reflect only a tiny portion of the literature that has developed around ADR and mediation.

who mostly theorize about them. The article focuses on belief in mediation because it does seem to be the rising star of the current ADR era.¹²

To provide a context for the results of this study, Part II of this article describes the growth of mediation during the current ADR era and some possible reasons for the growth, based on sociological theories of law, organizations, and the professions. Part III describes the methodology of the study, and Part IV describes the organizational settings where respondents work, their professional and disputing experience, and their sources of information about ADR. Respondents in this study are outside counsel with commercial practices, inside counsel in business firms, and business executives. Parts V and VI provide detailed analyses of the data collected in this study. Part V analyzes the respondents' belief in mediation, views about ADR, expectations about consequences of ADR for them personally, and their perceptions of the opinions of influential people in their lives about ADR. To provide a fuller understanding of these views, Part VI examines factors associated with the respondents' belief in mediation.

Part VII summarizes the findings of this study, noting the major similarities in responses between the three types of respondents, as well as the differences. All three types of respondents generally "believe in" mediation and have favorable views of mediation on a variety of measures. They are generally satisfied with their mediation experiences, but they generally do not believe that ADR would help them personally, and expectations about potential personal benefits are not associated with belief in mediation. Most respondents believe that their organizational superiors, leaders in their profession, and top corporate executives have favorable views of mediation and ADR. Although respondents generally believe that mediation often saves time and money as compared with traditional litigation, their belief in mediation seems to be most strongly related to perceptions that

12. Although this article focuses primarily on mediation, interviews in this study did not include separate and parallel questions on many topics about different ADR procedures (e.g., separate questions about expected effects of mediation and arbitration) due to time limitations. Some questions refer to aspects of ADR generally and mediation specifically, depending on how much respondents were expected to distinguish the procedures in answering the question. As a result, the questions and answers—and thus the discussion in this article—do not all focus exclusively on mediation. This may, indeed, reflect actual patterns of opinions, which combine beliefs about different ADR procedures about some matters, separate them about other matters, and confuse them about yet others. Given the actual and perceived differences between ADR procedures, it would be desirable to include separate questions on mediation and arbitration in future research.

mediation helps preserve relationships and that business' top executives are often satisfied with the results in suits where mediation is used, especially relative to suits where mediation is not used. For the attorneys, belief in mediation is also associated with satisfaction with their experiences with ADR and perceptions that their organizational superiors have favorable opinions about ADR. For the executives, belief in mediation is associated with perceptions that their professional leaders have favorable opinions about ADR.

Part VIII discusses the implications of the findings, including theoretical interpretations of the findings, offers possible strategies for mediation proponents, and cautions about potential problems with continued institutionalization of mediation. The responses in this study are consistent with patterns of institutionalization that are initially driven by calculation of perceived technical advantages of innovations and eventually shift to routinized processes of conformity with key actors in professional and organizational networks in pursuit of increased legitimacy. Based on this analysis of institutionalization of mediation, mediation proponents should take measures to assure satisfaction by mediation participants (particularly mediation practices encouraging good relationships), promote court-ordered mediation, and advocate for rules requiring attorneys to consult with clients about ADR options. Part VIII includes cautions about institutionalization processes, including the potential for dysfunctional transformation of mediation practices during the process of routinizing mediation, as well as unexpected de-institutionalization.

Finally, Part IX considers whether belief in mediation is part of a larger "process pluralist" ideology consisting of an interrelated set of beliefs that embrace the availability and acceptability of a wide range of goals, norms, procedures, results, professional roles, skills, and styles in handling disputes involving legal issues. While this study cannot directly answer that question, it does suggest that the existence, shape, and diffusion of such an ideology could shape dispute resolution practices for decades to come. Part IX also suggests that continued institutionalization of mediation may require a balance of true believers in mediation and more qualified believers, and that signals sent through professional and organizational channels may be critical in continued diffusion (or contraction) of belief in mediation by key actors.

II. GROWTH OF MEDIATION AND ADR IN THE CURRENT ADR ERA

A. *Expansion of ADR Practice and Ideology*

Since the 1960s and 1970s, there has been a remarkable growth in the ADR field. During this current ADR era,¹³ visionaries have proposed the creation of ambitious “new” structures for dispute handling and lawyers and other professionals have devised innovative disputing procedures.¹⁴ For example, numerous neighborhood mediation¹⁵ and court-annexed ADR¹⁶ programs have been established around the U.S. Formal associations of practitioners have been organized within specific fields like family mediation, as well as interdisciplinary organizations dealing with dispute resolution that operate on local, state, national, and international levels.¹⁷ Major foundations have provided ADR programs with substantial support,

13. Although the term ADR was probably coined in recent decades, histories of disputing in the U.S. have shown that there has been a gradual accumulation of disputing forums outside the traditional court process going back to the earliest times in US history. *See generally* JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983). Reforms such as juvenile courts, small claims courts, labor arbitration, and commercial arbitration have been added over a long period to address relatively narrow sets of problems. Indeed, the problems prompting each of these reforms prior to the current ADR era were relatively small in the context of the overall court system. Lawyers, judges, and legislators responded to the problems with piecemeal solutions. *See id.*; CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 20-32 (2d ed. 1996); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996).

Jeffrey Stempel suggests that the 1976 Pound Conference is an appropriate point to mark the beginning of the modern ADR movement. Stempel argues that “new ADR” is more likely than “old ADR” to involve, among other things, mass-produced procedures affecting large classes of persons or entities. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 n.32, 334-40 (1996).

14. *See, e.g.*, Richard Danzig, *Toward Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Edgar S. Cahn & Jean C. Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW 927 (1966).

15. *See* Roehl & Cook, *supra* note 7; HARRINGTON, *supra* note 13. The National Association for Community Mediation’s 1997 Annual Report estimates that there are more than 550 community mediation centers in the United States. National Association for Community Mediation (visited Aug. 15, 1999) <<http://www.nafcm.org/annual.html>>.

16. *See* PLAPINGER & SHAW, *supra* note 1.

17. *See* Mediation Information Resource Center, *Mediation Organizations* (visited Aug. 15, 1999) <<http://www.mediate.com/organize/knownorg.cfm>>.

and practitioners and scholars have produced voluminous literatures.¹⁸ Mass communication media have publicized the existence, benefits, and problems of ADR processes.

Evidence of public (or at least major government and business) support for ADR includes: (1) the enactment of the Civil Justice Reform Act of 1990 and the Alternative Dispute Resolution Act of 1998, which authorize federal courts to develop ADR programs,¹⁹ (2) the spread of procedures by which courts routinely refer substantial proportions of their cases to various disputing mechanisms,²⁰ (3) funding of ADR programs by state and local governments through direct appropriations and court filing fees,²¹ and (4) the CPR Institute for Dispute Resolution's campaign starting in 1983 to solicit pledges from large corporations (and more recently, law firms) to consider using ADR disputing procedures.²²

Figure 1 demonstrates a surge in state legislation regarding ADR in the 1980s.²³ The volume of legislation has probably grown

18. See Esser, *supra* note 2, at 499-501; Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DEN. U. L. REV. 437, 445 (1989). The William and Flora Hewlett Foundation probably has the largest foundation conflict resolution program. In 1998, it awarded millions of dollars of grants for theory development, practitioner organizations, consensus building, public participation, policymaking, international conflict resolution, "emerging issues," and development of the field generally. William and Flora Hewlett Foundation, *1998 Conflict Resolution Grants* (visited Aug. 31, 1999) <<http://www.hewlett.org/>>.

19. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089; Alternative Dispute Resolution Act of 1998, 105 Pub. L. No. 105-315, 112 Stat. 2993. The 1998 Act states, "Each United States district court shall devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district."

20. See NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY & PRACTICE* §§6:04, 7:01-02 (1994 & Supp. 1998).

21. See PLAPINGER & SHAW, *supra* note 1, at 43-55.

22. Approximately 4,000 operating companies and 1,500 law firms have signed the CPR Corporate Policy Statement on Alternatives to Litigation. The corporate pledge states, in part:

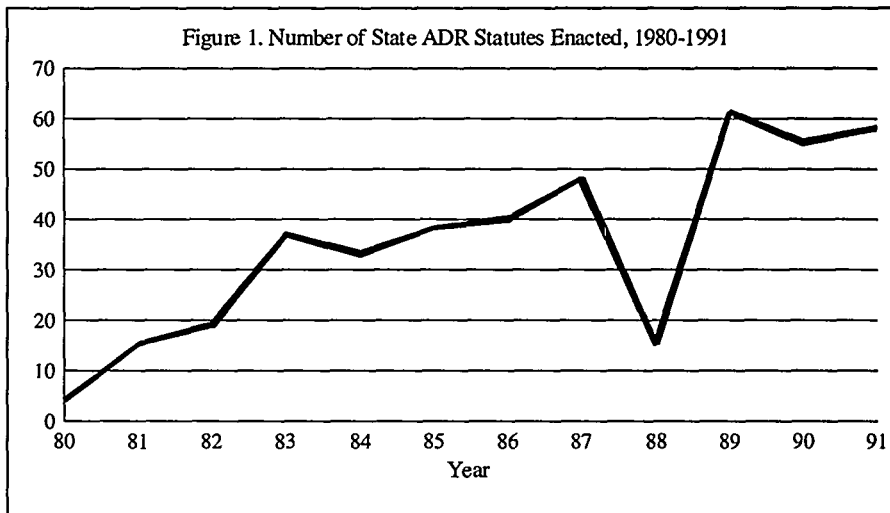
In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing litigation.

CPR Institute for Dispute Resolution (visited Sept. 1, 1999) <<http://www.cpradr.org/pledges.html>>.

For an account of the CPR pledge campaign, see Cronin-Harris, *supra* note 13, at 862-63.

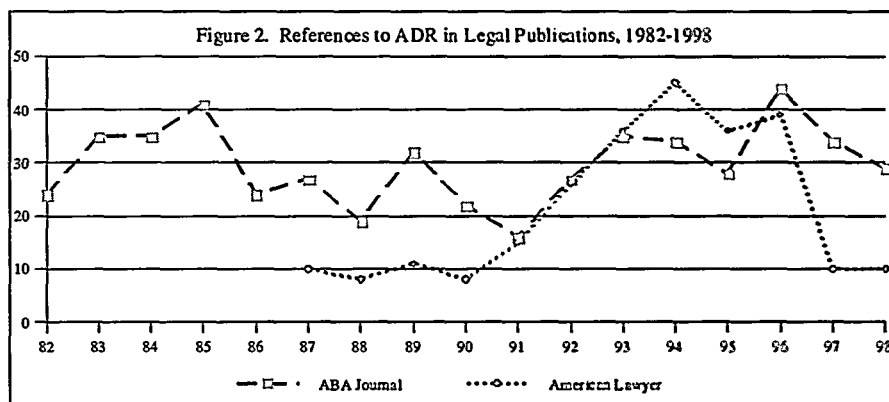
23. See STANDING COMM. ON DISPUTE RESOLUTION, AMERICAN BAR ASS'N, *LEGISLATION ON DISPUTE RESOLUTION: 1990/1991 ADDENDUM TO THE 1989 FEDERAL AND STATE DISPUTE RESOLUTION MONOGRAPH* 80 fig. (1992).

even more in the 1990s.²⁴ Figure 2 illustrates how ideas and information about ADR have been diffused within the community of legal practitioners. The American Bar Association, which has been promoting ADR use, published substantial numbers of articles in the *ABA Journal* going back at least to the early 1980s. While the number of items peaked in the early 1980s and again in the mid 1990s, dipping in the late 1980s, the *ABA Journal* has generally included an average of two to three items per month for more than the past 15 years. The legal press, as reflected by national publications like *American Lawyer*, noticeably increased their coverage in the early 1990s.²⁵ This diffusion pattern of stories about ADR reflects an initial burst of activity by professional organizations and government entities followed, with some lag, by news coverage in the legal press of bar association activities and ADR usage.



24. One and one half volumes of Rogers and McEwen's two-volume treatise are devoted to mediation legislation. See ROGERS & McEWEN, *supra* note 20, at apps. A-C.

25. The data in Figure 2 are based on searches of the NEXIS database for items including the terms "mediation," "arbitration," "alternative dispute resolution," and "ADR." To focus on the current ADR era, the search excluded articles that included the term "union." These articles were excluded because resolution of labor disputes is a somewhat distinct area that is largely a product of earlier ADR eras. The NEXIS database for the *American Lawyer* begins with monthly issues published in 1987.



The current wave of ADR developments seems much broader than prior waves²⁶ in that it is not limited to small and confined parts of the disputing world. Rather, the current wave is intended to change what some might consider the “heartland” of disputing, touching virtually all types of disputes and disputants. Although it is hard to fully document the growth of ADR in quantitative terms, it seems clear that the current wave of ADR has grown very rapidly.

I submit that this growth in ADR is closely linked to the diffusion of an ideology²⁷ supporting this expansion. I suggest that this is a kind of legal pluralist ideology that supported the expansion of ADR activities—and particularly mediation—during the current ADR era. This pluralist ideology, which I call “process pluralism,” challenges an ideology of legal centralism that has been widely accepted within the legal profession.²⁸ The propositions in both ideologies combine descriptive and normative elements. They reflect what is thought to be, in fact, normal, and they express what is believed to be the appropriate shape of reality.²⁹

26. See *supra* note 13.

27. In this article, the term “ideology” is used to refer to a system of related beliefs used to understand and interpret social action. See *From the Special Issue Editors*, 22 L. & Soc’y REV. 629 (1988). Although the term “ideology” sometimes has pejorative connotations, I use the term descriptively in this article, without intent to praise or condemn particular ideologies or their adherents.

28. For definition and description of process pluralist ideology, see *infra* text accompanying notes 35-42. In brief, this ideology holds that many different features of disputing processes—such as goals, norms, procedures, results, professional roles, skills, and styles in handling disputes—can be manipulated and customized for each dispute.

29. See Marc Galanter, *The Portable Soc 2; or, What to Do Until the Doctrine Comes*, in *GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO* 246, 253 (J. J. MacAloon ed., 1992).

A legal centralist ideology holds that the courts, the law, and lawyers are the primary means for handling disputes involving legal issues.³⁰ Under this worldview, government is the principal locus of legal controls, operating through a court system. This system is a coherent structure consisting of a hierarchical set of courts in which each court acts according to prescribed and universal rules to achieve specified instrumental purposes that reflect widely shared values. The courts follow the direction of higher authorities to announce, apply, and sometimes change rules. Professionals trained in the law are needed to staff the courts and represent disputants. The prototypical mode of legal action is adjudication.³¹

Over time, problems developed with legal centralist theory and practice.³² The problems were perceived as relatively small anomalies that did not fundamentally threaten the core of legal centralist ideology. It was still generally taken for granted that handling problems socially defined as "legal disputes" normally meant "litigation,"³³ if not adjudication, in government courts and agencies or in their shadows.³⁴ Indeed, many of the innovations consisted of new varieties of government courts such as small claims, juvenile, and family courts.

As problems with legal centralist theory and practice accumulated, however, it became difficult to accommodate the "fixes" within legal centralist ideology. I suggest that a "process pluralist" ideology³⁵ evolved to address these problems.³⁶ This ideology is hypothesized to consist of an interrelated set of beliefs that embrace the

30. See Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y REV. 869, 889 (1988).

31. See generally Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1,1 (1981); Galanter, *supra* note 29, at 250-53.

32. See, e.g., AUERBACH, *supra* note 13, at 138-47. He writes:

So we are possessed of vastly more laws and lawyers than any other society; we are also more concerned with lawlessness than any other people. The more laws we have, of course, the more laws will be broken; the more we then need the services of courts; the more congested the legal system becomes; the more we yearn for alternatives . . .

Id. at 141-42.

33. Galanter defines litigation as "the strategic pursuit of a settlement through mobilizing the court process." Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

34. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-72 (1979).

35. Robert A. Baruch Bush uses the term "process pluralism" referring to advocacy of a technocratic process of optimizing the matching of disputes with disputing mechanisms. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989). The quintessential manifestations of these schemes are the "Multi-Door Courthouses"

availability and acceptability of a wide range of goals, norms, procedures, results, professional roles, skills, and styles in handling disputes involving legal issues. The essence of this ideology is that many different features of disputing processes can be manipulated and customized for each dispute. This might be done by disputants themselves or those who might be considered "disputing technicians" (including lawyers, judges, mediators, court planners and administrators, and others).

A key element of process pluralism is the belief in the legitimacy of a multiplicity of disputing mechanisms. In addition to trials in government courts, it accepts the legitimacy of diverse disputing procedures and providers including, for example, neighborhood mediation centers, private "rent-a-judges," all-purpose private court systems, university tribunals, and automobile manufacturers' procedures for handling consumer warranty complaints.³⁷ This ideology also recognizes and accepts a wide assortment of values along a range of other dimensions, including values of the traditional legal system,

in several cities in which court personnel assess cases filed in court and make referrals to different disputing mechanisms. My meaning is much broader than Bush's: under my usage, the ideology does not necessarily take any position regarding the feasibility or desirability of such matching processes. Although some who hold a process pluralist ideology (as I define it) undoubtedly are committed to such matching schemes, people may accept the legitimacy of multiple disputing procedures without having an opinion about matching schemes.

Process pluralism is somewhat similar to what Merry calls the "new legal pluralism." Generally, legal pluralism is "a situation in which two or more legal systems coexist in the same social field." Merry, *supra* note 30, at 870. Merry distinguishes the new legal pluralism from "classical legal pluralism," which focused on colonial and postcolonial societies, analyzing the relationships between the law of colonizers and the colonized. In contrast, new legal pluralism has focused on law in non-colonized societies, analyzing unofficial forms of ordering and relations between dominant and subordinate groups. Although there is some overlap between the concepts of the new legal pluralism and process pluralism, there are also differences. For example, new legal pluralism is more likely to focus on truly informal mechanisms such as arguments in a bar or corporate gossip than is process pluralism, which focuses primarily on mechanisms such as arbitration or mini-trials using more explicit and deliberate norms and procedures. See Galanter, *supra* note 31, at 18. In addition, the distinction between state law and non-state law is of major importance for legal pluralism, see Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J. L. & Soc'y 192, 193 (1993), but has limited significance for process pluralism.

36. Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 66-110 (2d ed. 1970).

37. See Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 *STUD. IN L. POL. & Soc'y* 393, 400-07 (1992).

but does not presumptively favor the traditional values.³⁸ For example, a process pluralist ideology accepts the validity of various norms used in resolving disputes—such as economic norms, ethical precepts, and other cultural beliefs—as well as those expressed in legal rules. It promotes consideration of many different disputing outcomes in addition to judicial monetary and injunctive remedies, including promotion of behavior, relationships, and outcomes beyond the legal and practical reach of the courts.³⁹ It conceives of an array of professional roles for lawyers, including some roles in which lawyers do not exercise predominant decision-making authority over disputants, non-legal professionals, and non-professionals.⁴⁰ Under this view, non-lawyers may be more appropriate to manage resolution of some disputes than lawyers. It recognizes different negotiation styles and strategies,⁴¹ such as what Kritzer calls an “appropriate-result, consensus-oriented” strategy focusing on parties’ interests, in addition to a more traditional “maximal-result, concessions-oriented” strategy.⁴² In contrast to pure legal centralist ideology, which makes a strong assumption that law, lawyers, legal remedies, and courts should predominate in legal disputes, process pluralist ideology challenges all those assumptions. Thus, for at least a group of ADR practitioners and visionaries, ADR is more than an incremental technical innovation; rather, it reflects a major change in their ideology of disputing.

38. This account describes general values that I believe cluster together logically and perhaps empirically. Nonetheless, there are certainly differences between believers in process pluralist ideology. For example, there is a range of opinion among believers about the traditional legal system with some believers expressing hostility about it and with others being more neutral or favorable. Even those expressing hostility presumably recognize some value in maintaining the traditional system and using it in some cases. Whether there is, in fact, a coherent process pluralist ideology is discussed *infra* in Part IX.

39. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 794-829 (1984).

40. One aspect of changing professional roles and relationships, particularly involving attorneys, is a trend to requiring attorneys to advise clients about ADR options. See ROGERS & McEWEN, *supra* note 20, at §4:03; Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Frank E. A. Sander, *At Issue: Professional Responsibility, Should There Be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, A.B.A. J., Nov. 1990, at 50.

41. See generally DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* (1989) (detailing different negotiation strategies).

42. See HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 122-23 (1991).

During the current ADR era, perceived problems with the court system had already accumulated as described above. In and around the legal profession, critiques of legal centralist ideology were advanced by “institutional entrepreneurs” including judges and other public officials, bar association committees and leaders, ADR service providers, business associations, foundation officials, and sociolegal scholars.⁴³ These institutional entrepreneurs articulated and enacted legitimating justifications of a process pluralist ideology such as the definition of standards of ethics and professional conduct and specialties of dispute resolution expertise, identification of advantages of ADR procedures compared with court adjudication, and the creation of consumer and state demand for ADR services.⁴⁴ These justifications claimed a large number of potential benefits, including time and cost savings, preservation of relationships, and better-quality outcomes, among many others.⁴⁵ As process pluralist theories diffused through the general public, and especially relevant professional communities, fewer people took it for granted that the court system was “the only way” to handle situations defined as legal disputes. Presumably, awareness of problems, development of “new” solutions, and formulation of legitimating theories repeatedly reinforced each other, thus perpetuating the diffusion process.⁴⁶

This article examines the extent to which mediation has become accepted by important populations of disputants and legal advocates. Belief in the legitimacy of ADR, and mediation in particular, is a key indicator of process pluralism. Thus, this article focuses on factors that help explain why people may believe in mediation to a greater or lesser extent. Before describing the methodology and findings of the study, the article will summarize sociological theories explaining diffusion of innovations generally.

B. *Sociological Theories Explaining Diffusion of ADR Practices and Ideology*

This Part describes theories in the sociology of law, organizations, and professions relevant to the diffusion of process pluralist ideology or, at least, increased belief in mediation. The sociology of

43. See Silbey & Sarat, *supra* note 18, at 445.

44. See generally PLAPINGER & SHAW, *supra* note 1.

45. See GOLDBERG ET AL., *supra* note 5, at 8.

46. See generally Walter W. Powell, *Expanding the Scope of Institutional Analysis*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 183, 201 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (describing cyclical processes of institutional reproduction).

law has long been concerned with the production and dissemination of knowledge. "The law" itself is a form of knowledge that is circulated by legislatures, courts, and other rulemaking bodies.⁴⁷ The notion of the "shadow of the law" described by Mnookin and Kornhauser refers to dispersal of legal knowledge through society. Although most disputes are resolved through private negotiation rather than court adjudication, Mnookin and Kornhauser show how the law creates socially recognized "bargaining endowments"—typically evaluated and communicated by lawyers—that profoundly affect this private ordering.⁴⁸ Further analysis describes a two-way process in which the law also operates in the "shadow of indigenous ordering," i.e., where extralegal norms are introduced into legal systems and affect legal norms and processes.⁴⁹ Sociolegal scholars have devoted a great deal of attention to the generation, transformation, and distribution of understanding about law and disputing by a wide range of social actors including members of the general public,⁵⁰ police,⁵¹ judges,⁵² mediators,⁵³ and especially lawyers as counselors and agents of their clients.⁵⁴ Much of this literature highlights how people often respond to legal matters based on normal and recurrent features of situations

47. Thus Galanter writes, for example, "[I]t appears that the impact of adjudication is accomplished primarily through the transmission and reception of information rather than through the direct imposition of controls." Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151, 219 (Leon Lipson & Stanton Wheeler eds., 1986). See also Richard Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 L. & Soc'y REV. 91, 99 (1978).

48. See Mnookin & Kornhauser, *supra* note 34, at 968-69.

49. See Galanter, *supra* note 31, at 17-27 (citing, among others, studies of how standard-setting by a hospital accreditation body contributed to the erosion of the doctrine of charitable immunity and how informal relations between automobile manufacturers and their dealers contributed to the development of legal machinery for resolving their disputes).

50. See, e.g., William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & Soc'y REV. 631 (1980-81); Tom R. Tyler, *WHY PEOPLE OBEY THE LAW* 51 (1990); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992).

51. See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* (1966).

52. See, e.g., Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256 (1986).

53. See, e.g., Peter Adler et al., *The Ideologies of Mediation: The Movement's Own Story*, 10 L. & POL'Y 317 (1988); *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* (Sally Engle Merry & Neal Milner eds., 1993); *WHEN TALK WORKS: PROFILES OF MEDIATORS* (Deborah M. Kolb et al. eds., 1994).

54. See, e.g., AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995); Mark Suchman,

more than express criteria of law or social policy.⁵⁵ For example, Ross shows how automobile claims adjusters and personal injury lawyers regularly rely on folk conceptions in their day-to-day determinations of liability and damages in ways that are quite different than prescribed by the doctrines of negligence law.⁵⁶ A very common distinction in a wide range of settings is whether a matter is considered "routine" (and thus treatable using simple rules-of-thumb) or whether the matter falls outside the ambit of such routine processing and thus requires more careful analysis.⁵⁷

Institutional theories of organizations examine processes of how conceptions become taken-for-granted notions having a "rule-like status in social thought and action."⁵⁸ Institutional theorists typically focus on cognitive and cultural explanations in which individuals act based more on assumptions about appropriateness than on calculations for goal achievement that form the basis of rational-actor theories. Taken-for-granted understandings of the social world, rather than highly self-conscious analyses, are considered the prototypical

On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley 95-126 (1994) (unpublished Ph.D. dissertation, Stanford University, on file with author); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context*, 21 L. & Soc'y REV. 585, 587 (1987); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & Soc'y REV. 115, 141 (1979); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & Soc'y REV. 15 (1967).

55. See Susan S. Silbey, *A Sociological Interpretation of the Relationship Between Law and Society*, in LAW AND THE ORDERING OF OUR LIFE TOGETHER 1, 12-13 (Richard J. Neuhaus ed., 1989).

56. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 87-135 (2d ed. 1980).

57. See, e.g., *id.*; David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

58. Paul J. DiMaggio & Walter W. Powell, *Introduction*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 7-9 (Walter W. Powell & Paul J. DiMaggio eds., 1991). Professional licensing is an example of a rule-like structure that is presumably intended to ensure competent service, though it is an indirect and often ineffective means of doing so. Similarly, various business innovations (such as quality circles, to name just one) are presumably intended to promote profitability, but again are loosely linked to actual production efficiencies. They become institutions as people take them for granted as proper and effective measures, typically without continued consideration of their actual efficacy. Though popular conceptions often focus on institutions as organizational structures, most scholarly analyses are much broader, including generally recognized norms, roles, and conventions. Thus, institutions may range "from handshakes to marriages to strategic-planning departments" and may cover "a wide territorial range, from understandings within a single family to myths of rationality and progress in the world system." *Id.*

form of cognitive functioning. Legitimacy, rather than efficiency, is generally viewed as the primary engine driving social interaction.⁵⁹ Thus, people are considered as acting primarily based on standards of obligation as defined in their particular cultural and historical contexts. "Institutionalized arrangements are reproduced because individuals often cannot even conceive of appropriate alternatives (or because they regard as unrealistic alternatives they can imagine)."⁶⁰ Thus, in the disputing context, for example, after a mediation program becomes deeply institutionalized, people mediate cases because that is how broad classes of cases are handled rather than because of careful case-by-case assessments.

Recent work on institutional theory focuses on how professions, governments, educational institutions, and other legitimating enterprises generate abstract cognitive models that form the basis for less-than-conscious conformity (or "isomorphism") by individuals and organizations.⁶¹ In particular, DiMaggio and Powell argue that "normative isomorphism" is an important mechanism of institutional diffusion.⁶² Normative isomorphism entails legitimation of cognitive models by university specialists and the diffusion of such models through professional networks. Professional networks are often considered to play an especially important role in the diffusion of innovations.⁶³ Such networks are important in institutional theory for at least two related reasons. First, these networks constitute important channels for diffusion of institutional practices and beliefs through

59. See James G. March, *Decisions in Organizations and Theories of Choice*, in PERSPECTIVES ON ORGANIZATION DESIGN AND BEHAVIOR 205, 221-226 (Andrew H. Van de Ven & W. F. Joyce eds., 1981); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 148 (1983). For attempts to integrate differing theoretical perspectives, see Paul J. DiMaggio, *Interest and Agency in Institutional Theory*, in INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT 3, 15 (Lynne G. Zucker ed., 1988); Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 143, 153-57 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

60. See DiMaggio & Powell, *supra* note 58, at 10-11.

61. In contrast with the "old institutionalism," which focused on concrete normative, political, and cultural influences in local environments, e.g., PHILIP SELZNICK, *TVA AND THE GRASS ROOTS* (1949), "new institutionalism" postulates that larger scale environmental forces affect entire industries, professions, and societies. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); DiMaggio & Powell, *supra* note 58; DiMaggio & Powell, *supra* note 59.

62. See DiMaggio & Powell, *supra* note 59, at 152-54.

63. See, e.g., *id.* at 152-53; Suchman, *supra* note 54; Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47, 61 (1992).

job placement and socialization. Second, institutionalized criteria (such as friendship, status, or professional norms) affect organizational behavior instead of, or in addition to, criteria relating to organizational outcomes and efficiency.⁶⁴ In the disputing context, this might come into play where influential professional and organizational leaders endorse (and thus legitimize) use of mediation or other ADR procedures. Institutional theory would thus focus on use of mediation because it is seen as legitimate and appropriate in the local culture, rather than because of calculations of technical advantages of using mediation in particular cases.

Specifically regarding diffusion of innovations, institutional theory suggests that both efficacy and legitimacy of innovations are important, though in differing proportions at different stages of diffusion. Tolbert and Zucker argue that in the early stages of institutionalization, those adopting innovations are often motivated to improve performance, and that after a certain point in the institutionalization process, adoption of innovations is based more on the innovations' value in providing legitimacy than on improving performance.⁶⁵ For example, their study of civil service reforms in U.S. cities showed that at the beginning of the institutionalization of these reforms, adoption of reforms could be predicted by factors such as the existence of local corruption, efforts to control influence of immigrants, and pressure from middle classes to implement scientific management procedures. After the notion of civil service reforms had been legitimated, these factors no longer explained why cities adopted the reforms or did not do so. In essence, cities eventually adopted civil service reforms because the reforms were perceived to be the right way to organize local government, rather than because the reforms were designed to solve problems actually existing in those cities.

Professionals often play key roles in diffusion of innovations, as they typically are well-suited both to identify problems in existing technologies and to recognize threats to organizational legitimacy. Professionals can perform these activities because of their specialized knowledge and their placement in key organizational roles. Thus, institutional theory contends that professional networks are important media of diffusion and that the extent to which professionals adopt an

64. See DiMaggio & Powell, *supra* note 59, at 147-53.

65. See Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935*, 28 ADMIN. SCI. Q. 22, 35-36 (1983).

innovation promoted by their profession is related to the strength of ties to their profession.⁶⁶

Similarly, institutional theory argues that the strength of ties to intra-organizational networks would predict the extent to which organizational members would adopt an innovation being diffused through intra-organizational channels. This seems especially likely regarding ideas promoted by organizational leaders.⁶⁷ While it may seem "only rational" for organizational members to agree with powerful authorities, such agreement reflects an institutionalization process in which following rules or accepting the "company line" substitutes for individualized calculation and judgment.⁶⁸ Thus, institutional theory argues that acceptance of innovations such as regularly using mediation is related to strength of ties to organizations and their leaders who support the innovations, as well as the perceived power, success, and professional prestige of the organizations and leaders.⁶⁹

As this summary suggests, theories of institutionalism and professions overlap. Many different theories of professions suggest that the production and use of abstract specialized knowledge play a critical role in the development of professions and the work of professionals.⁷⁰ In functionalist theories, the production of professional knowledge and the education of professionals are important tasks for professionals to perform properly in their social functions, such as providing order and justice (by the legal profession) and health (by the medical profession).⁷¹

66. See DiMaggio and Powell, *supra* note 59, at 152-54.

67. See Jeffrey Pfeffer, *Management as Symbolic Action: The Creation and Maintenance of Organizational Paradigms*, 3 RES. ORGANIZATIONAL BEHAV. 1, 19-22 (1981).

68. See Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOC. REV. 726, 731-42 (1977). This is a classic experiment in which subjects were asked to estimate the distance that a light moved. Subjects gave their estimates after a confederate gave an estimate of the same distance. Subjects' estimates were closer to the confederates' estimates when confederates were identified as the most senior member of the organization than when identified simply as a member of the organization or not identified at all.

69. See DiMaggio & Powell, *supra* note 59, at 155.

70. See generally Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1 (Robert L. Nelson et al. eds., 1992) [hereinafter *Introduction*]; Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177 (Robert L. Nelson et al. eds., 1992).

71. See TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951).

A "market control" school agrees that knowledge is key to the development of professions, but these theorists argue that it plays a different role than the functionalists argue it plays.⁷² Under this perspective, professionalism is the "collective mobility project" of various occupational groups to be achieved through control over their markets. These theorists argue that professional groups try to establish a consensus about a cognitive basis for their work to justify monopoly control over markets for their expertise. In addition to providing justifications for control over a sphere of public life, these cognitive claims also provide professionals with a sense of identity.⁷³

A third school of thought highlights the role of abstract knowledge as the principal element in definitions of professionalism. Abbott argues that the development of professions is much more contingent than suggested by functionalist and market control theories. He asserts that jurisdictions of particular professions shift over time in relation to the jurisdictions of "neighboring" professions. Abstract knowledge is a critical element of a profession, in this view, because the abstract nature of a profession's knowledge base provides a professional group with the flexibility to claim desired work tasks for its jurisdiction and exclude undesirable tasks from it.⁷⁴ Thus, these three approaches all emphasize the importance of knowledge in generating and maintaining professions, albeit for different reasons. In the disputing context, one might expect development of knowledge about mediation to be generated by and spread through professionals like lawyers.

Various theories of professionalization highlight professional autonomy as a primary motivating force for the work of professionals and development of professional knowledge. Different theories use the concept of autonomy, referring to struggles with various sets of competitors and countervailing forces. For example, Solomon identifies several influences from which lawyers and their professional associations seek independence and control, including clients, government regulation, market ethics, and encroachment of other occupations on lawyers' work jurisdiction.⁷⁵ In structural/functional

72. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); see also RICHARD L. ABEL, *AMERICAN LAWYERS* (1989).

73. See LARSON, *supra* note 72, at 49-50.

74. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE EXPERT DIVISION OF LABOR* 8-9 (1988).

75. See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144 (Robert L. Nelson et al. eds., 1992); see also Harriet Gross & Grace Budrys, *Control Over Work in a Prepaid Group Practice*, in 6

theories, professionals must be autonomous from their clients so that they can properly perform their social functions.⁷⁶ In market-control theories, professionals—who typically work in large organizations—seek autonomy from bureaucratic control in capitalist organizations as they compete for status within class hierarchies.⁷⁷ In addition, various theorists have argued that the production and control of knowledge and techniques is a principal source of professionals' social power in relation to competing professions and in society more generally.⁷⁸ Whereas some theorists focus on professionals' efforts seeking control *over others*, Van Maanen and Barley focus on efforts to protect against control *by others* in a persistent quest for occupational *self-control*.⁷⁹ In all these theories, new knowledge and techniques—such as mediation—as means for handling disputes are potent weapons in struggles for control over professional work.

Some scholars challenge the notion that professionals are primarily motivated to maintain and increase their autonomy.⁸⁰ In contrast to theories emphasizing professional autonomy as a primary motivating force behind the growth of professions, other theories highlight the goal of maximizing social status. Such theories focus on aspirations of enhanced social respect enjoyed by virtue of holding more prestigious occupational roles. Thus, professional groups may, for example, seek to raise standards of practice as a means of legitimating and improving their collective status.⁸¹ By the same token, efforts to adopt new professional ideas and practices, such as mediation, may be motivated by a desire to increase individual or collective professional status.

In contrast, economic theories generally focus on motivations to achieve goals and maximize self-interest. Such rational theories typically assume that individuals act based on careful calculations of optimality of alternative possible outcomes rather than judgments of

CURRENT RES. ON OCCUPATIONS AND PROFESSIONS 279, 280-82 (H. Z. Lopata and J. A. Levy, eds. 1991).

76. See PARSONS *supra* note 71, at 434-45; Nelson & Trubek, *Introduction*, *supra* note 70, at 15-16.

77. See LARSON, *supra* note 72, at 190-93.

78. See, e.g., ABBOTT, *supra* note 74, at 8; LARSON, *supra* note 72, at 180-81; DiMaggio & Powell, *supra* note 59, at 152-53.

79. John Van Maanen & Stephen R. Barley, *Occupational Communities: Culture and Control in Organizations*, 6 RES. ORGANIZATIONAL BEHAV. 287, 333-39 (1984).

80. See, e.g., ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 231-34 (1988).

81. See LARSON, *supra* note 72, at 216; ABEL, *supra* note 72, at 18-30.

appropriateness of behavior.⁸² Economic theories of professionalization explain that development of specialized skills and development of knowledge are, effectively, human capital investments used as a means of increasing professionals' economic returns.⁸³ Increased professional training (or other means of obtaining professional knowledge, such as subscription to professional publications) is needed to obtain specialized knowledge necessary for competition in the market for professional services. The costs of acquiring such information can be used to justify increased prices of services on the basis of increased efficiency or quality.⁸⁴ Under an economic perspective, adoption of professional innovations may be the result of efforts to increase efficiency and provide more desirable services for consumers with the ultimate goal of advancing professionals' own economic interests.⁸⁵ Economic theory would predict that professionals would develop and adopt mediation practices to the extent that the professionals would expect to profit from those practices.

Increasing work satisfaction is another potential motivating force for the development of new professional practices. Thus, for example, the opportunity to focus on practicing medicine, concentrating on what is best for patients without the business pressures of private practice, led some doctors into practice in health maintenance organizations. For such doctors, a "service ideology," focusing on practicing "good medicine," may be the most important aspect of their professional work.⁸⁶ By the same token, McEwen et al. found that attorneys in Maine supported use of divorce mediation because it helped

82. See Meyer & Rowan, *supra* note 61, at 340-45; March, *supra* note 59, at 221-23.

83. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 90-108 (1991).

84. See ABEL, *supra* note 72, at 25.

85. Market-control theories suggest a different mechanism leading to similar results. Under these theories, developing professional knowledge would legitimize control over certain occupational markets that would increase professionals' economic positions, among other things. See LARSON, *supra* note 72, at 216-19.

86. See Gross & Budrys, *supra* note 75, at 285. Though working for an HMO presumably entails a tradeoff of business and administrative activities as compared with private practice, rather than a total relief from such distractions from the work of practicing medicine, physicians may well experience some net relief from such pressures. Gross and Budrys' study was based on interviews conducted in 1987. As a result of changing conditions in the health care industry, doctors may now be less likely to view HMOs as providing opportunities to perform satisfying work. Despite (or perhaps because of) such changes, doctors may still be motivated by opportunities to do work they find satisfying, though perhaps in other organizational forms. See Steven Greenhouse, *A.M.A.'s Delegates Vote to Unionize*, N. Y. TIMES, June 24, 1999,

them solve problems inherent in divorce practice.⁸⁷ This is similar to Skolnick's description of police officers' perspectives as craftsmen interpreting organizational and legal developments through the lens of pride in their abilities to perform their craft of law enforcement.⁸⁸ Although this explanation is somewhat similar to functionalist theory, it does not focus so much on achievement of societal functions as on satisfaction of individuals' desires to perform their professional tasks well and serve clients optimally.

As the preceding discussion indicates, various sociological theories consider the creation and dissemination of new knowledge, ideas, and techniques central to the development of professions and organizational life for complementary reasons. Institutional theory focuses on the taken-for-granted nature of conceptions and highlights the role of professionals in creating and disseminating such concepts. By creating and using abstract conceptions in their day-to-day work, professionals legitimate these conceptions by making them increasingly taken-for-granted. Various theories of the professions focus on the importance of developing a body of specialized and abstract knowledge on which professions generally—and professionals individually—can serve social functions, gain market control, secure autonomy in performing professional functions, increase satisfaction in doing their work, serve their own economic interests and their organizations' economic interests, maximize social status, and derive legitimacy.

This study examines whether recent increased belief in mediation is related to linkages to legitimating organizations and professional networks, as suggested by institutional theory. In particular, it analyzes the perspectives of lawyers, who are the quintessential repeat-players⁸⁹ in dealing with legal disputes, and compares them with the perspectives of business executives, who are typically less-frequent players. Lawyers (at least litigators) are professional dispute-handlers who develop cognitive models of disputing and incorporate these models into their everyday practices.⁹⁰ It is precisely this kind of knowledge that the professions literature suggests is critically

at A1 (quoting American Medical Association president who argues that unionization of doctors would focus on improving patient care).

87. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & Soc'y Rev. 149, 156-63 (1994).

88. SKOLNICK, *supra* note 51, at 196-99, 233-35.

89. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* 9 L. & Soc'y Rev. 95, 97-104 (1974).

90. Cf. Suchman, *supra* note 54, at 292-300. ("Law firms enjoy regular contact with a large number of companies facing similar sets of operational challenges, and

important in achieving a variety of professional goals. Institutional theory particularly focuses on a need to maintain legitimacy and thus could help explain belief in mediation. During the same period that the legal profession has been encountering a continued attack on its public legitimacy,⁹¹ the level of ADR activity has been growing amidst suggestions that it may help address public relations problems of the legal profession.⁹² Thus, perception of ADR (generally) and mediation (in particular) as a specialized body of knowledge addressing problems faced by professionals and their clients would be expected to affect the legitimacy of the legal profession. Various theories of the professions also provide potential explanations for increased belief in mediation. These theories suggest that professionals might accept this ideology based on expectations of increased professional autonomy, social status, material advancement, and work satisfaction. Based on interviews with business lawyers and executives in this study, Part VIII.A, *infra*, presents an analysis of how well these theories may help explain increased belief in mediation.

III. METHODOLOGY

This study is based on two complementary data analyses: (1) qualitative analysis of in-depth interviews, and (2) quantitative analysis of survey interviews. The qualitative interviews capture a richer expression of the respondents' opinions, including some of their own analyses of how their views are interrelated. However, because of the nonrandom sampling and the small number of qualitative interviews, it is difficult to generalize from that data to the general population of business lawyers and executives. The survey interviews have complementary advantages and disadvantages. These interviews permit sharply focused and standardized probes yielding data that can be analyzed statistically, and, because the survey respondents were selected using a randomized procedure, the survey results provide reasonable reflections of the survey populations within calculable

this vicarious exposure allows attorneys to monitor wide ranges of client strategies, and to formulate coherent accounts of the determinants of success and failure.”)

91. See generally Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

92. See Randall T. Shepard, *Lawyer-Bashing and The Challenge of a Sensible Response*, 27 IND. L. REV. 699, 707 (1994).

margins of error. Combining both methods in this study permits "triangulation,"⁹³ providing a more comprehensive explanation of disputing ideologies than would be possible from either method individually.

I conducted 13 face-to-face qualitative interviews in southern Wisconsin in the first half of 1994. Respondents were selected using a "snowball" sampling procedure, i.e., respondents and other knowledgeable people were asked to suggest names of other possible respondents. There were roughly equal numbers of each of three types of respondents: four inside counsel, four outside counsel, and five non-lawyer executives. I developed interview protocols to serve as a general guide for the interviews. Based on the flow of the interviews, I asked unscripted follow-up questions and skipped questions in the protocol. Interviews generally lasted 90 to 150 minutes. The interviews were tape recorded and transcribed for analysis. Excerpts of these interviews were selected for this article to illustrate some patterns reflected in the quantitative data.⁹⁴

For the quantitative analysis, I conducted standardized telephone interviews of respondents in Massachusetts, Pennsylvania, Tennessee, and Florida. I selected respondents from a few states, rather than on a nationwide basis, to highlight differences between respondents, since legal and ADR cultures—which are likely to affect (at least attorney) opinions—might vary dramatically by state.⁹⁵

93. See MARTYN HAMMERSLEY & PAUL ATKINSON, *ETHNOGRAPHY: PRINCIPLES IN PRACTICE* 198-200 (1983) (noting that collecting data using different sources and methods increases confidence in validity of findings).

94. In some instances, grammatical errors common in spoken language have been left as spoken when this did not interfere with the understanding of the quoted statements. Some quotations have been edited to enhance readability. Where speakers repeated words or used similar patterns of everyday conversation that did not affect the meaning, the repeated words were omitted without ellipsis or brackets. All editing has maintained the substance and tone of respondents' statements. Full, unedited transcripts are on file with the author. Because the subjects were promised that the interviews would be confidential, the subjects are identified only by number and an indication of whether they were an outside counsel, inside counsel, or executive. The interviews were numbered in the order that they were transcribed rather than the order in which they were conducted.

95. The sampling procedure centered around what I initially called "ADR culture," but later called "mediation culture," based on responses to the survey. See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEG. L. REV. 1, 69-70 (1998) [hereinafter Lande, *Failing Faith*]. The literature on local legal culture attempts to explain variations in patterns of practice based on informal norms and expectations of regular players in a local legal system about how things are done there. See Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 L. & Soc'y REV. 535, 538-41 (1993). Casual observations of differences in legal structures, behavior, and

The sampling frame⁹⁶ of non-lawyer executives was drawn from the Compact Disclosure database on companies filing information with the U.S. Securities and Exchange Commission. I constructed sampling frames to include all named officers in companies with more than 50 employees. The sampling frames for inside and outside counsel were drawn from the Westlaw online database, which contained listings of approximately 600,000 lawyers in the U.S. Potential inside counsel respondents were excluded if they worked for firms with fewer than 50 employees or if they did not spend at least five percent of their time working on litigation. Because insurance companies are uniquely in the business of litigation, inside counsel employed by insurance companies were also excluded. To select outside counsel, I used the commercial law directory in Westlaw and selected attorneys whose listings indicated that their practices include litigation. I excluded outside counsel from the sample if they worked in firms employing 10 or fewer attorneys or if they did not spend at least five percent of their time working on litigation.

Using these databases, I developed 12 sampling frames for selection of respondents: one for each of the three types of respondent in each of the four states. Then, potential respondents were selected randomly from each sampling frame. Survey interviews were completed for 178 respondents, including 70 outside counsel, 58 inside counsel, and 50 executives. The overall response rate was 66%. The attorneys were especially cooperative, as more than 80% agreed to participate. Executives were less cooperative; only 43% agreed to participate.⁹⁷ The interviews were completed in the second half of

attitudes about ADR in different states and localities raises the possibility of analogous "mediation culture" (or "ADR culture") phenomena. For example, the mediation culture in one state may be quite congenial to a large volume of mediation practice whereas the mediation culture in another state might be quite inhospitable for mediation practice. In fact, respondents in Florida and Massachusetts, two states identified as having strong ADR cultures, had greater belief in mediation than respondents in Tennessee and Pennsylvania, two states identified as having weak ADR cultures. See App.1, *infra*. The differences generally were observed after controlling for a variety of other variables. See John Lande, *The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of Business Lawyers and Executives* 182-183 (1995) (unpublished Ph.D. dissertation, University of Wisconsin (Madison) (on file with author)) [hereinafter Lande, *Ideology of Disputing*].

For further information about the procedures for selecting states for this survey, see Lande, *Failing Faith*, *supra* at 69-70.

96. A sampling frame is a list of potential respondents who may be asked to participate in the survey. In this survey, I randomly selected potential respondents to be interviewed from the sampling frames described in the text.

97. High response rates reduce the risk of selection bias (i.e., where the opinions of respondents were systematically different in significant ways from those who refused to respond to the complete interview). In this survey, the response rates for the

1994.⁹⁸ They were conducted by telephone and generally lasted 20 to 25 minutes. Slightly different versions of the surveys were developed to fit the different types of respondents, though the substance was the same for all respondents.

Many of the survey questions used 11-point "Likert scales," with possible answers ranging from zero to ten and a middle category of five.⁹⁹ To simplify the presentation in this article, the data are generally collapsed into three categories: zero to four, five, and six to ten, reflecting responses below, at, and above the middle category. Collapsing the data makes it easier to present and understand; however, it sacrifices some important information about the intensity of responses. The statistical significance tests¹⁰⁰ were based on the full, uncollapsed scales.

attorneys are quite high by social science standards, suggesting a low risk of selection bias. Although the response rate for the executives is obviously lower than for the attorneys, it is not unusually low and some statistical tests suggest that it did not indicate significant selection bias. In addition to the 178 complete interviews, I conducted very brief interviews with 18 respondents who were not willing to give the time for a complete interview. These interviews were used to help test for selection bias. For more information about testing for selection bias, see Lande, *Failing Faith*, *supra* note 95, at 10 n.33. In addition, as available, responses in the brief interviews were used in the main analyses of this study.

98. Obviously the data reflect respondents' perspectives when they were interviewed and their views may change over time. Unlike litigation, which is already deeply institutionalized in U.S. society, mediation and ADR have been in the process of institutionalization in recent decades. Thus, it is quite possible that opinions about mediation have changed since the data were collected for this article. It would be useful to conduct similar studies in the future to track changes in the opinions described in this article.

99. For example, respondents were asked whether they agreed or disagreed with various statements on a scale from zero to ten, where zero meant that they strongly disagreed, ten meant that they strongly agreed, and five was right in the middle. The same type of scale was used with questions in other response categories such as whether they thought that their professional leaders have favorable or unfavorable opinions about ADR, whether they were satisfied or dissatisfied with their experiences in ADR, etc. A number of questions asked respondents to give their opinions in the form of frequencies, such as how often executives are satisfied with the results of mediation. Respondents were told that zero meant "never," ten meant "always," and five meant "about half the time."

100. A finding is considered statistically significant if the probability of error due to chance is less than a specified amount. This study focuses on relationships between pairs of variables (i.e., correlations), thus the rest of this footnote refers to whether they are statistically significant. In the social sciences, the minimum probability acceptable for statistical significance is conventionally considered to be five percent and this is indicated as " $p < .05$." In other words, the observed relationship is considered statistically significant if there is less than a five percent chance that one would observe the relationship in the sample data if such a relationship did not exist in the full population. It may be easier to think of it this way: there is at least a 95% probability that there really is a relationship in the full population given

The survey interviews included a series of questions regarding respondents' opinions about litigation¹⁰¹ and a similar series of questions regarding their opinions about mediation, arbitration, and ADR generally.¹⁰² Indeed, some of the questions about ADR used the same wording as the questions about litigation, except for a reference to ADR (or mediation) instead of litigation (or the courts). For example, one question asked for a rating of agreement or disagreement with the statement "The legal system generally considers the needs and practices of particular business communities." In the series of questions about ADR, respondents were asked for a similar rating about the statement "Mediators and arbitrators generally consider the needs and practices of particular business communities." For these questions it is possible to create relative ratings by subtracting the ratings about litigation from the ratings about ADR. If a respondent gave the same rating to both questions, the relative rating would be zero. If the rating about ADR was higher than the rating for litigation, the relative rating would be a positive number. If the rating about ADR was lower than the rating for litigation, the relative rating would be a negative number.

the statistical relationship in the data collected from the sample. One has even greater confidence in a finding if the relationship is significant at the .01 or .001 levels. Note that one should *not* interpret a statistically significant finding as indicating that the relationship necessarily exists in the population; rather, this simply means that the collected data support that hypothesis. The converse is also true: a finding that is *not* statistically significant does not necessarily mean that there is no such relationship in the population. If an observation (such as a correlation presented in this article) is not statistically significant, one should generally not make any inference based on the observation, such as the sign or magnitude of the correlation. Note that statistical significance is affected by the sample size so that, for example, a .20 correlation may be statistically significant in a large sample but not in a small sample. See generally JOHN NETER ET AL., *APPLIED STATISTICS* 310-38 (3d ed. 1988).

101. For presentation of the survey results regarding respondents' opinions about litigation, see Lande, *Failing Faith*, *supra* note 95.

102. Because this study dealt with ADR more generally, survey questions were designed to include a combination of questions about ADR generally and mediation specifically, depending on how much respondents were expected to distinguish the procedures in answering the question. See *supra* note 12. This article necessarily reports about the dispute resolution procedure(s) actually referred to in the questions, not simply mediation.

IV. RESPONDENTS' BACKGROUND AND DISPUTING EXPERIENCE AND KNOWLEDGE¹⁰³

A. *Respondents' Professional Experience and Organizational Settings*

In general, the survey respondents are middle-aged men. The vast majority (85%) of the sample is male. They ranged in age from 27 to 77 with an average of 44. The average age was 42 for outside counsel, 40 for inside counsel, and 50 for executives.¹⁰⁴ Respondents work for firms in a wide variety of industries or, in the case of outside counsel, serve clients in many different industries. The industries most represented in the sample are general manufacturing, finance, health care, and computers. Outside counsel had been employed by their current firms for an average of eight years, compared with ten years for inside counsel and thirteen years for executives.

Inside counsel in the sample generally work for larger and more complex firms than the executives. Inside counsel gave a median¹⁰⁵ estimate of 4000 to 5000 employees, including 6 to 10 attorneys, in their firms. By contrast, the executives gave a median estimate of 750 to 1000 employees, including one attorney, in their firms. Close to half (43%) of the inside counsel's firms are wholly-owned subsidiaries whereas very few (6%) of the executives' firms are wholly-owned subsidiaries.

Most outside counsel (59%) in the sample work in firms with offices in one or two cities. The median size of their law firm is in the range of 51 to 100 attorneys. The vast majority of outside counsel's clients (an average estimate of 82%) are businesses, and most of these business clients (an average estimate of 73%) have annual revenues of more than \$1 million.

Most respondents own an interest in their firms, including 66% of the inside counsel and 90% of the executives who own stock in their firms. Slightly more than half of the outside counsel (53%) are equity

103. This Part provides a summary of the survey respondents' background and experience. For further detail, see Lande, *Ideology of Disputing*, *supra* note 95, at 65-88.

104. The age difference (as well as the length of tenure in their positions described in the text) is probably a function of differences in sampling frames. The frames for the attorneys included both junior and senior attorneys whereas the frame for executives included only the top several levels of executives in the corporations. For further information on the sampling frames, see *supra* Part III.

105. The median refers to the 50th percentile in a group, i.e., half the values are above the median and half are below it. The median is sometimes considered a better measure of central tendency than an average when some scores have extreme values and thus skew the average disproportionately.

partners in their law firms. The different types of respondents fit into very different organizational authority structures. To determine who are their "organizational superiors," respondents were asked about the positions of the people whose judgments and decisions affected them most in their current positions. For outside counsel in this sample, the organizational superiors are divided almost equally between partners in their law firms and their clients, with somewhat more in the former category. The organizational superiors for approximately two-thirds of inside counsel in the sample are non-legal executives, officers, and managers in their firms. For most of the other inside counsel, their organizational superiors were the top officials in their legal departments. The organizational superiors for three-quarters of the executives are other top executives and officers in their firms. Most of the other executives said that they were affected most by the judgments and decisions of their firms' customers or clients.

B. *Respondents' Experience with Litigation and ADR*

Inside counsel and outside counsel in the sample had practiced law for an average of 14 years; however, outside counsel had devoted a greater proportion of their time to litigation activities than had inside counsel. Outside counsel estimated that litigation took an average of 83% of their time in the prior year, compared with 57% for inside counsel. Indeed, so many outside counsel devote virtually all of their time to litigation that the *median* response was 98% of their time. Outside counsel also devoted a greater proportion of *their entire legal careers* to litigation than inside counsel. Outside counsel said that they spent at least half of their time doing litigation in an average of 82% of the years since they received their law degrees; this compares with an average of 62% for inside counsel. Not surprisingly, the proportion of lawyers' *current time* devoted to litigation is strongly correlated with the proportion of their *careers* in which they have focused on litigation.¹⁰⁶

As these data indicate, for many lawyers, litigation is the central focus of their work. This is rarely the case for executives. As one

106. Correlation refers to the extent of linear association between two variables. Where two variables are perfectly associated, if one knows the value of one variable, one can tell the exact value of the other; in that situation, the correlation coefficient is 1.0. For example, the length of objects in inches is perfectly correlated with the length in feet. Correlations have a negative value if the increase in one variable is associated with the decrease of another variable. For example, if B is a point on a straight line with endpoints A and C, the distance between A and B is negatively correlated with the distance between B and C, i.e., -1.0. Larger correlation coefficients in absolute

might expect, executives in the study had less experience with litigation than the attorneys in the study. In fact, one needs to measure amount of experience quite differently for lawyers and non-lawyers. Overall, the executives in this study had little experience personally as a party, witness, or juror, but had somewhat more experience participating in decision-making about litigation for businesses. Thirty-two percent of the executives had never been a juror or witness and 40% had been a juror or witness only once or twice. Almost three-quarters (74%) said that they have never been a party in a lawsuit¹⁰⁷ and an additional 22% said that they had been a party only once. However, more than three-quarters (82%) said that they had been responsible, individually or as part of a team, for decision-making for a business in a lawsuit, with the median of four or five suits in which they had played such a role. Thus, most of the executives' personal experience with litigation had been in their professional capacity at work.

All three groups of respondents experienced litigation in their professional roles much more frequently from the perspective of defendants¹⁰⁸ rather than plaintiffs. This was especially true for inside counsel, whose average estimate was that their firm was a defendant in 82% of cases that they personally handled or supervised in the prior three years, compared with 65% for outside counsel, and 73% for executives.

Experience participating in ADR¹⁰⁹ varied by type of respondent. Outside counsel have the most experience as third-party neutrals

value (i.e., numerical value without regard to whether it is positive or negative) indicate greater degrees of association between the two variables. If there is no association, the correlation is 0. See NETER ET AL., *supra* note 100, at 172-73. Correlations indicated in the text are statistically significant unless otherwise indicated. For further information about statistical significance, see NETER ET AL., *supra* note 100.

107. This excluded situations where they may have been named as parties but were not personally involved in the events giving rise to the suit.

108. As several attorneys pointed out, the distinction between plaintiff and defendant status may be misleading in some cases where the parties have claims against each other and the formal status reflects who "got to the courthouse" or "pulled the trigger" first. Thus, the measure of how often the respondents' firms or clients are defendants is necessarily imprecise. Nonetheless, the concept was quite meaningful for respondents, and most had no problem providing estimates in response to this question.

109. Survey respondents were asked if they were familiar with the term "ADR." Those who said that they were not familiar with the term or who seemed to be unsure were read the following statement: "ADR' refers to procedures for resolving disputes using some third party other than a judge, such as an arbitrator, who makes a binding decision, or a mediator, who cannot make a binding decision but rather helps parties trying to reach an agreement." All respondents were read the following language, further defining the term for the purpose of the survey: "I am *not* including

(such as arbitrators or mediators),¹¹⁰ while executives have the least. About half of outside counsel (47%), one quarter of inside counsel (26%), and 7% of the executives have served as a neutrals at least once.¹¹¹ Respondents generally have more experience with ADR as partisans (i.e., advocates and principals) than as neutrals. The attorneys have much more experience as partisans in ADR than did the executives. Ninety percent of the outside counsel and 84% of the inside counsel have some experience as a partisan in ADR compared with only 39% of the executives.¹¹² More than half of the attorneys have participated as partisans in at least four ADR proceedings, compared with only 12 percent of executives.

C. Respondents' Sources of Information About ADR

Before considering the respondents' opinions about ADR, it is helpful to consider where they received their information about it. Respondents were given a list of potential sources of information and asked whether they had "gotten no information, a little information, or more than a little information about ADR from that source." After going through each information source on the list, they were asked to identify the source from which they received the most information. As Tables 1 and 2 indicate, personal experience with ADR is a major source of information for about two-thirds of the attorneys and one-

union grievance procedures, procedures in government agencies like the EEOC, or negotiation *without* a third party." This definition suggests that the terms mediation, arbitration, and ADR refer to somewhat formal procedures rather than informal interactions that are quite common in everyday life (e.g., mediating between co-workers or relatives). Respondents' answers to questions about frequency of ADR experience suggest that they generally understood the terms to be used in the more limited sense.

110. For simplicity, I refer to this as experience as being a "neutral." I use this term reflecting common usage, even though mediators and arbitrators may not necessarily be neutral in fact in some situations. See Lande, *supra* note 1, at 881-82 (noting that mediators may be biased consciously or unconsciously in favor of actual or prospective repeat customers).

111. This level of service as a neutral is somewhat lower than reported in a survey of Minnesota attorneys, where 70% reported having served as a neutral. Approximately 86% of the attorneys in the Minnesota sample are in private practice. These results are based on questionnaires from 748 attorneys reflecting a response rate of 74.8%. See BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 10, app. C-3, C-5 (1997). Only 17% of Western Australian attorneys reported serving as an ADR neutral during the prior year. See Zariski, *supra* note 5, at app. A.

112. This is comparable to the experience of Minnesota attorneys, 80% of whom reported using ADR in at least one civil case within the preceding two years. See McAdoo, *supra* note 111, at app. C-7. Almost half (42%) of Western Australian attorneys reported having represented a client in mediation during the preceding year. See Zariski, *supra* note 5.

third of the executives. This represents the largest single source of information, except that a slightly larger percentage of the executives said that they received more than a little information from attorneys. Indeed, it appears that attorneys generally are a major source of information about ADR. Almost half of the outside counsel said that they received more than a little information from colleagues in their firm and almost half of the inside counsel said that they received more than a little from attorneys who are not in their firm.¹¹³

The executives generally do not get much information about ADR beyond what they obtain from attorneys and personal experience. About half of the attorneys, by contrast, obtain information from most of the other sources listed, including providers of ADR services, continuing education programs, and professional publications. Only a small minority—ten percent or less—of all three types of respondents received more than a little information about ADR from their professional schooling. Given that 11 or 12 years is the median period since lawyers had received their degrees, many of the lawyers graduated from law school in the mid-1980s, when there was much less ADR in the curriculum than at present. The executives had received their degrees a median 22 years earlier; thus, many had been in school in the mid-1970s when there were even fewer ADR course offerings.

Table 1. Sources of "More than a Little" Information about ADR (percent who received "more than a little information" from each source)			
	Outside Counsel	Inside Counsel	Executives
Personal experience with ADR	69	62	32
Colleagues in their firm	46	21	14
Colleagues not in their firm	24	47	10
Lawyers (executives only)	—	—	36
ADR providers	51	38	6
Professional school	10	5	2
Continuing education	43	47	16
Professional publications	50	43	10

113. The wording of the questions varied for the attorneys and executives. The attorneys were asked about lawyers in their firms (or lawyers who were not in their firms). The executives were asked about colleagues in their firms other than lawyers (or such colleagues not in their firms).

Table 2. Sources of Most Information about ADR			
	Outside Counsel	Inside Counsel	Executives
Personal experience with ADR	42	40	33
Colleagues in their firm	13	7	7
Colleagues not in their firm	3	3	0
Lawyers (executives only)	–	–	37
ADR providers	15	10	0
Professional school	3	2	0
Continuing education	10	19	14
Professional publications	15	19	9
Total	101*	100	100
Number of respondents	69	58	43

* does not add to 100 percent due to rounding

V. RESPONDENTS' OPINIONS ABOUT MEDIATION AND ADR

In contrast to respondents' opinions about the court system, where there are regular and dramatic differences between respondents, the three types of respondents have remarkably similar and generally favorable opinions about mediation. Virtually all of the attorneys and many of the executives said that they were familiar with ADR. To be sure that the respondents had at least a basic understanding of ADR, they were given basic definitions of ADR as well as arbitration and mediation, the two principal ADR procedures. The fact that there are differences in knowledge about the processes is not a serious problem for this project, as it is not testing respondents' knowledge but rather is focusing on their *opinions* about how often these disputing processes are appropriate. In addition, respondents were asked about their level of knowledge and experience with ADR, permitting comparisons of opinions based on their levels of knowledge and experience.¹¹⁴

A. Belief in Mediation

A key element of contemporary disputing ideology deals with how often mediation or other ADR procedures are appropriate. This is the essence of the question when, for example, a businessperson asks a lawyer, "Are you a believer in ADR?"¹¹⁵ Though the question

114. See Tables 5 and 6, *infra*.

115. Interview with outside counsel 4 (Mar. 18, 1994). I recently attended a conference presentation on mediation of workers' compensation cases in which a panelist

implies that it can be answered with a simple "yes" or "no," many people qualify their answers based on various circumstances. Lawyers often prefer to talk in terms of case-by-case analyses. Even when people generalize, they typically refer to different categories of cases, amounts at stake, relationships between the players, stages in the disputes, or any number of other factors. Thus, it is probably impossible precisely to define and measure disputing ideologies in terms of belief in particular disputing procedures. Nevertheless, people are asked quite generally whether they are "believers in mediation," and many can interpret the question and answer it with little difficulty.

To permit people to reflect various contingencies into their responses, survey respondents in this study were asked *how often* they believe that it is appropriate to use mediation in lawsuits involving a business.¹¹⁶ For simplicity, responses to these questions are referred to as "belief in" mediation. This question also permitted respondents to reflect the intensity of their beliefs. It is not unusual in everyday conversation for people to say that mediation should be used in, say, virtually all cases, or only rarely, or in some but not all categories of cases. These responses provide some indication of what they believe about mediation. While numerical frequency measures inevitably simplify respondents' possibly complex beliefs, if well constructed, they may be reasonably good indicators of people's disputing ideologies.¹¹⁷

Respondents in this study believe that mediation is often appropriate to use in lawsuits involving a business, with the outside counsel expressing significantly more support than the executives. Majorities of both outside and inside counsel believe that mediation is appropriate in more than half the cases and another fifth believe

said, "I am a believer in mediation." Eddie H. Walker, Jr., Panel Discussion on Mediation at the 13th Annual Workers' Compensation Educational Conference of the Arkansas Workers' Compensation Commission (Aug. 26, 1999).

116. Following an introduction referring to disputes involving a business, respondents were asked "how often mediation is appropriate, where zero means never, ten means always, and five means about half the time."

117. See generally, HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS (1981). The survey questionnaire did not distinguish very much between characteristics of disputes. Most questions referred simply to disputes involving a business, though some questions specified that the dispute was brought by an individual against a business or was between two businesses. The preliminary interviews sought to identify "native" categorizations of disputes, but this was omitted from the survey because no simple, shared scheme was readily apparent. As a result, the survey data have some offsetting advantages and disadvantages. The principal disadvantage is that the questions are not placed in more real-life contexts. On the other hand, the survey questions may tap more generic ideologies, free of potentially confusing qualifications.

that it is appropriate in half these cases (see Table 3). No more than about a quarter of these attorneys believe that mediation is appropriate in less than half the cases. The executives also generally believe that mediation is often appropriate, with about half the executives saying that it is appropriate in about half of the cases and only 16% saying that it is appropriate in less than half the cases.¹¹⁸ Thus, while all groups believe that mediation should be used often in business disputes—i.e., “believe in” mediation—as a whole, outside counsel believe in mediation significantly more than the executives do.¹¹⁹ The aggregate responses of the inside counsel are in between the inside counsel and executives and are not significantly different from the other two types of respondents.

A substantial minority of respondents’ belief in mediation can be considered a matter of faith. This seems like an appropriate interpretation for respondents who answered this question with a response of “10,” indicating that they believe that mediation is always

118. The uncertainty of some executives is reflected in the following excerpt at the end of a long response to a question about whether courts should refer more cases to ADR. “I guess I would have to say if what I understand to be the case on the growth of ADR within our society, it would suggest to me that it must be working and working well.” Interview with executive 3 (Apr. 15, 1994).

119. These findings are generally consistent with the “RAND Report” in finding that lawyers and litigants generally believe that mediation is appropriate in court suits. The RAND Report included a study of court-annexed mediation programs in four federal district courts. Following cases that were assigned to ADR (including two programs featuring early neutral evaluation) or that were not assigned to ADR for comparison, the researchers collected surveys from 1739 attorneys and 592 litigants, reflecting response rates of 45% and 11%, respectively. Cases were generally assigned to ADR or not under a random experimental design. See JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 269-75 (1996) (commonly referred to as the “RAND Report”). Almost all of the attorneys (94%) and 83% of the litigants whose cases were assigned to mediation believe that it was appropriate to attempt mediation in their case. *Id.* at 364, 402 (with percentages based on the number of valid responses, i.e., excluding surveys with missing data). The RAND Report was criticized by some in the mediation community for failing to show significant advantages over unmediated litigation. See generally Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 1-4 (1998) (collecting and summarizing analyses of the RAND Report). However, the RAND results show that mediation participants generally have favorable opinions about mediation (though attorneys and litigants in unmediated cases also generally have favorable views about their cases). Medley and Schellenberg developed a “civil mediation scale,” combining responses to 14 items in a survey of 226 Indiana attorneys in the sample with a 45% response rate. They found that 60% had favorable views of civil mediation and 17% had unfavorable views. This was more positive than the views reflected in a divorce mediation scale in which 45% had favorable views and 24% had unfavorable views. Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185, 194 (1994).

Table 3. Belief in Mediation by Type of Respondent

Proportion of Cases	Outside Counsel	Inside Counsel	Executives	Total
Less than half*	19	27	16	21
Half*	21	20	49	29
More than half*	60	53	35	50
Total	100	100	100	100
Average (on scale from 0 to 10)	6.4	6.0	5.4	5.9
Number of respondents	72	60	57	189

*percentage of respondents saying that mediation is appropriate in various proportions of lawsuits involving a business

appropriate in business disputes. Those giving responses of "9" might be considered in this category as well.¹²⁰ Overall, 13% of respondents gave ratings of 9 or 10. This intensity of belief is concentrated in the ranks of attorneys, as 18% of the outside counsel and 15% of the inside counsel gave those responses compared with only 5% of the executives. An additional 22% of outside counsel, 12% of inside counsel, and 7% of executives gave responses of "8."

The qualitative interviews help flesh out what it means to "believe in" mediation. Some are true believers who have faith in ADR and give glowing accounts like the following, which is based on frustration with the traditional court system:

ADR . . . beat[s] every other alternative. All the other alternatives have somebody angry. ADR doesn't . . . Those kinds of things, where the parties resolve it, they resolve it. In the end, they resolve it by doing something they don't do in court: they shake hands. In court, you're not going to shake that bugger's hand. You hate him. No matter how angry you are at the beginning, even if you win, you're still angry at the end. The emotions have become even worse. So, all you've managed to do is cause animosity and ill will and all of that stuff. Nobody wins

120. This interpretation requires a plausible, though not necessarily correct, leap of logic. It seems likely that people who believe that mediation is always or almost always appropriate have beliefs that are resistant to change, but that is not necessarily the case.

with that. . . . Anybody that I've ever known that has used ADR has been pleased with it.¹²¹

Others believe that mediation and other forms of ADR are sometimes appropriate, but are more cautious in their belief in mediation. The following quote from an outside counsel represents the views of many lawyers and executives who think that mediation is appropriate in some but certainly not all cases:

I generally agree with the notion that not all disputes have to be fought until the last dog is hung, and that in the kinds of disputes where I think it can be helpful, it's really my obligation to try to direct my client into earlier, cheaper, better resolution. . . . But [ADR is] not the be-all-and-end-all of dispute resolution. I'm skeptical about it as I try to be about everything I read about business.¹²²

Several attorneys noted how ADR has become trendy. "It" has become a popular ideology that some people come to favor (or not). Indeed, lawyers and executives and their firms may become identified as "believers" or not:

My experience has been, for example, with large corporations, in-house legal departments have sort of gotten the word that "ADR is something we need to think about. It's important." So one of the things people are always asking your firm is, "What experience do you have in ADR? Are you believers in ADR?"¹²³

Several respondents described how it is sometimes a superficial popular ideology that people may generally favor without knowing much about. Indeed, as they learn more about it and how they might use it in particular disputes, some supposed ideological supporters get cold feet:¹²⁴

It's funny, ADR was—maybe it still is—trendy. It was certainly trendy four or five years ago, but it's been replaced by some

121. Interview with inside counsel 2 (Mar. 2, 1994). Some questions in both the qualitative and survey interviews dealt with ADR generally as well as mediation in particular. See *supra* note 104. Although some of the questions and answers are framed in terms of ADR generally, they may be relevant specifically to mediation as well.

122. Interview with outside counsel 1 (Mar. 17, 1994).

123. Interview with outside counsel 4 (Mar. 18, 1994).

124. Cf. Sally Engle Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUSTICE Sys. J. 151, 153 (1984) (ethnographic study of two communities finding that although residents generally prefer to resolve disputes informally, they often do not use ADR because, by the time a conflict is serious enough to warrant outside intervention, mediation does not provide vindication, protection of legal rights, advocacy of their behalf, or a third party determination of the truth and wrongfulness of the other side).

newer and trendier set of initials, TQM [total quality management] or something. It's whatever they read in Business Week that week. You will have some clients say, "Well, we're in favor of ADR." But when you actually bring them a case and say, "You know, this thing is going to sit around in court for two-and-a-half years and it's going to cost you this and it's going to do that, and shouldn't we move it?," [they say,] "Well, I don't think so."¹²⁵

These quotes provide a good sense of how often the respondents believe that mediation is appropriate in business disputes. Also, the quotes suggest that opinions about how often mediation is appropriate are reasonably good indicators of people's belief in mediation. Part VI, *supra*, considers how respondents' belief in mediation is related to the other variables discussed in this article.

B. *Satisfaction with ADR*

Many studies of ADR use measures of disputant satisfaction to evaluate ADR procedures.¹²⁶ As in most studies, in this study, respondents' evaluations of their experiences with ADR are also generally quite favorable. Approximately three-quarters of respondents who had some personal experience with ADR were satisfied with both the process (76%) and results (73%). Only about ten percent said that they were dissatisfied.¹²⁷ Evaluations of the process and results are very highly correlated ($r = .83$).¹²⁸ Unlike belief in mediation,

125. Interview with outside counsel 1 (Mar. 17, 1994).

126. See Lynn A. Kerbeshian, *ADR: To Be or . . . ?*, 70 N.D. L. Rev. 381, 385-90 (1994) (noting that numerous studies find that disputants in ADR procedures are more satisfied than disputants in non-ADR disputing procedures); Esser, *supra* note 2, at 529, 532-33 (noting that numerous studies find that disputants in ADR procedures are more satisfied than disputants in non-ADR disputing procedures).

127. The results in this study are comparable to those in the RAND Report for attorneys although a smaller proportion of litigants in the RAND study expressed satisfaction than in this study. Of the attorneys, 73% reported being satisfied with the outcome and 66% reported satisfaction with the mediation. See KAKALIK ET AL., *supra* note 119, at 369 (percentages based on total number of valid responses). Only about half of litigants expressed satisfaction with the outcome (49%) or the mediation (50%). *Id.* at 404. Generally, the satisfaction of attorneys and litigants whose cases were mediated was not significantly different than those whose cases were not litigated. *Id.* at 297-303 (based on question referring to "overall court management of this case"). The results in this project are consistent with a survey of inside and outside counsel that found that both groups were more satisfied than dissatisfied with mediation. The results were based on a sample of 246 corporate counsel in Fortune 1000 companies and outside counsel specializing in litigation and business insurance. The response rate appears to be 11%. See DELOITTE & TOUCHE, DELOITTE & TOUCHE LITIGATION SERVICES 1993 SURVEY OF GENERAL AND OUTSIDE COUNSEL 1, 11 (1993).

128. For discussion of correlation, see *supra* note 106.

there was no significant difference in satisfaction with the results or process of their ADR experiences by type of respondent or state.¹²⁹ The similarity in satisfaction with ADR by type of respondent also contrasts with the stark differences between the attorneys and executives in their satisfaction with *litigation*, about which the outside counsel were much more satisfied than the executives.¹³⁰

The following statement by the general counsel of a major manufacturing firm is a typical testimonial:

Certainly my empirical experience and this company's empirical experience is that ADR is far less expensive than litigation in resolving disputes, and that's ultimately what litigation is all about. I think you can get to the heart of the matter a lot quicker and again with a lot less expense.¹³¹

One might expect that satisfaction with ADR would be related to amount of ADR experience. Amount of experience as a *neutral* in ADR (e.g., as a mediator or arbitrator) is mildly correlated with satisfaction with the *results* ($r = .18$), and is not significantly correlated with satisfaction with the *process* in their ADR experiences. Amount of experience as a *partisan* in ADR (e.g., as a party or attorney representing a party) is not significantly correlated with satisfaction with either the results or process. This lack of significant correlation between amount of experience and satisfaction with ADR found in the survey would probably be surprising to many people sympathetic to greater ADR use, as many believe that ADR experience and satisfaction go hand-in-hand. For example, an attorney who is generally satisfied with his ADR experiences said:

I have certainly had people say that they're skeptical. Typically those have been people who haven't tried it. . . . I don't know people who have been through the experience who are negative about it. Some people certainly have been through bad experiences where the case hasn't settled. But I don't know anyone who said that, "It was a waste of my time," because I think the collateral benefits of knowing your case better and sooner are going to be there.¹³²

Respondents generally gave more favorable evaluations of their ADR experiences than their non-ADR litigation experiences.¹³³ More

129. In the rest of the presentation of the data, differences by type of respondent will generally be noted only when statistically significant.

130. See Lande, *Failing Faith*, *supra* note 95, at 23.

131. Interview with inside counsel 3 (Mar. 9, 1994).

132. Interview with outside counsel 1 (Mar. 17, 1994).

133. The distinction between litigation and ADR is not as clear as it might seem because much ADR activity takes place in the context of litigation. See Galanter, *The*

than half (53%) of the respondents rated the *results* of ADR more favorably than the results of litigation, and more than two-thirds (68%) rated the *process* in ADR more favorably.¹³⁴ Less than a third (29%) rated the results of litigation more favorably than ADR and only 14% rated the process of litigation more favorably. This extends findings of other empirical research that fairly consistently indicate that disputants in ADR processes are more satisfied than disputants in litigation generally.¹³⁵

Compared with the attorneys, executives are much more satisfied with ADR than litigation. As there is no significant difference between the three groups' evaluations of ADR, the difference in relative evaluations is a reflection of executives' greater distaste for litigation than greater absolute satisfaction with ADR. The attorneys also gave high satisfaction ratings to ADR, although a substantial minority—especially of outside counsel and especially regarding the results—gave higher ratings to their litigation experiences. Thus, 91% of executives, 68% of inside counsel, and 60% of outside counsel gave higher ratings to ADR regarding satisfaction with the *process*. Regarding satisfaction with the *results*, 78% of the executives, 54% of inside counsel, and 44% of outside counsel gave higher ratings to ADR. Even for the outside counsel regarding satisfaction with the results, this represented a plurality of the outside counsel, as 16% gave the same ratings to ADR and litigation, and 41% gave higher ratings to litigation.¹³⁶

These statistical comparisons reflect a general thinking pattern in which respondents evaluated ADR by comparison with traditional litigation. One indicator was that many survey respondents decided on ratings for questions about ADR by referring to their ratings of comparable items about litigation. This pattern is also very common in everyday conversation. For example, in describing why he thinks

Quality of Settlements, 1988 J. DISP. RESOL. 55, 61-62 (1988). Indeed, ADR, especially mediation, has become so incorporated into the routine process of pretrial litigation, especially in Florida and Massachusetts, that they are hard to separate in practice. See Lande, *supra* note 1, at 845-47 (describing "liti-mediation" culture where mediation is the normal way to end litigation). Nonetheless, people obviously think of the two quite differently, as this study suggests. Despite the close inter-relationship between ADR and litigation, for linguistic simplicity, they will be referred to as if they are clearly distinct.

134. This analysis is based on the comparison of respondents' answers to separate questions about litigation and ADR rather than asking the respondents to compare the different processes. See Part III, *supra*, for description of "relative" measures.

135. See Esser, *supra* note 2, at 529, 532-33.

136. The total of ratings by outside counsel regarding the results does not add to 100% due to rounding.

that businesses should routinely consider using ADR, an attorney made the following comparison with litigation:

The principal reason is economic, unfortunately. It's too expensive to go to court anymore. Many of these [ADR procedures] work quite well. I've used all of them and I'd say in the majority of the cases, you don't get rid of it all the way, but you get closer. In many, you do resolve it entirely. It saves people's time, a great deal of aggravation and potential anger and problems and financially. So I think it's economic and it's also from the point of view of a company's functioning and how one feels about other people. It's usually a more pleasant way to go.¹³⁷

Similarly, another attorney explained his preference for ADR (and especially mediation) by comparing goals in ADR and trial:

In the courtroom, you're stuck with certain rules and all of that stuff. You're also caught in an adversarial battle. In an ADR situation, when it is the two of you and then a mediator or whatever, ideally . . . all three of you have one goal: to resolve it. Whereas in a courtroom, you've got two parties whose goals are not to resolve it—it's to duke it out and the judge is to sort of weigh in with who won. So you've got nobody pulling this whole thing together to come up with a common resolution. ADR is good because it does that.¹³⁸

In sum, respondents generally reported high levels of satisfaction with their personal experiences with ADR, both absolutely and relative to litigation without ADR.

C. *Expected Personal Consequences of Increased ADR Use*

One might expect that belief in mediation would be especially related to perceptions about how increased mediation use would affect respondents' personal interests. This might be particularly true of business lawyers and executives, two groups that are widely perceived to be self-interested and results-oriented. Certainly there is much sociological theory predicting such relationships.¹³⁹

Respondents were asked about their expectations of the consequences if there were a "substantial increase in the proportion of cases" in which their firm¹⁴⁰ or a major business client of their

137. Interview with outside counsel 2 (Apr. 16, 1994).

138. Interview with inside counsel 2 (Mar. 2, 1994).

139. See *supra* Part II.B.

140. This version of the question was used with executives and inside counsel.

firm¹⁴¹ used ADR. Respondents were asked about five types of consequences for them (or people like them)¹⁴² of increased ADR usage: (a) effect on their personal compensation, (b) opportunity for advancement, (c) their relative importance within their firm (hereinafter "prestige"), (d) their ability to work independent of direction of colleagues in other professions (hereinafter "autonomy"),¹⁴³ and (e) their ability to do work they find very satisfying.

Large proportions of all three types of respondents believe that there would probably be no changes for them in any of these ways if there were a substantial shift of dispute handling toward greater ADR use. Although statistical tests do not indicate many significant differences in the average responses of the three types of respondents, the distributions do vary substantially.

First consider the expected effects on compensation. Respondents generally believe that increasing the proportion of the disputes handled through ADR procedures by their firm or major client would not affect their own individual compensation. More than three-quarters of the inside counsel (78%) and executives (79%) gave this response, as did half of the outside counsel (51%). Almost none of the inside counsel or executives expected that an increase in the proportion of cases using ADR would decrease their compensation, whereas a quarter of outside counsel (25%) gave this response. This difference is not as sharp as it might seem, considering that most of the outside counsel who expected a decrease gave a "4" rating, indicating only a small expected decrease in compensation. Indeed, the difference between the average response of outside counsel and the other two groups of respondents is not statistically significant.

141. This version of the question was used with outside counsel.

142. Respondents were asked about their expectations of the probable consequences of increased volume of litigation for "typical" members of the class of respondent that they belonged to (i.e., attorneys in private firms, inside counsel, or top executives). In preliminary interviews in which respondents were asked about probable effects for them personally, several respondents had difficulty addressing the question because of what they said were idiosyncratic elements in their organizations. In response to questions about "typical" members of their class of respondent, many respondents explicitly based their responses on the situation in their own organizations, and probably many did so implicitly. Thus, responses to these questions are likely to reflect how respondents perceive their own current situations or similar situations in other firms where they might expect to work in the future.

143. For each group of respondents, the question referred to the position of those most likely to have formal authority or practical influence over the respondents' activities. The question for outside counsel referred to autonomy from top executives of their major business client (whose ADR use increased). The question for inside counsel referred to autonomy from top executives of their firms. The question for executives referred to autonomy from the firms' lawyers.

Expectations about the effect on opportunities for advancement of increased use of ADR are somewhat similar to expectations about compensation. More than half of outside counsel (57%) and inside counsel (53%) and almost three-quarters of executives (73%) doubt that there would be any effect on advancement. However, almost half of inside counsel (45%) believe that increased use of ADR would increase opportunities for advancement, compared with about a third of outside counsel (29%), and a quarter of executives (25%). Virtually no inside counsel or executives think that it would decrease advancement opportunities, whereas 13% of outside counsel expect that effect. Again, the differences are not statistically significant, although the shapes of the distributions are quite different, as outside counsels' responses were more widely distributed than those of inside counsel or executives.

There is, however, a clear difference in expectations about effect on prestige of increased ADR use. More than two-thirds of inside counsel (69%) believe that their prestige would increase, compared with less than one quarter of executives (23%) and one third of outside counsel (32%). By contrast, more than half of the outside counsel (57%) and almost three-quarters of executives (73%) believe that there would be no change in their prestige if their firm or major client used more ADR, compared with less than a third of inside counsel (28%) who believe so. Only 10% of outside counsel and less than five percent of inside counsel and executives believe that increased ADR use would hurt their prestige.¹⁴⁴

About half of each type of respondent believe that increased ADR use would not affect their professional autonomy. Executives may expect that increased ADR use would enhance their professional autonomy more than outside counsel do.¹⁴⁵ Forty percent of executives and inside counsel expect this effect, compared with 22% of outside counsel. The distribution of inside counsel's responses is close to that of the executives but not significantly different than outside counsel.

A somewhat larger proportion of inside counsel (43%) than outside counsel (34%) expect that increased ADR use would increase opportunities to do satisfying work. Only one third of inside counsel

144. Zariski's survey of Western Australian attorneys found that 71% disagreed with the proposition that their standing amongst colleagues might suffer if they participated more often in non-judicial dispute resolution processes, compared with only 8% who agreed. Zariski, *supra* note 5, at app. A §15.

145. Statistical analysis indicates that the differences between executives and outside counsel are almost but not quite statistically significant. For discussion of the statistical analysis, see Lande, *Ideology of Disputing*, *supra* note 95, at 146 n.9.

(33%) expect no effect, compared with more than half of the outside counsel (55%). The distribution of executives' responses—44% of whom expect an increase and 48% of whom expect no change—is in between the two groups of attorneys, though not significantly different than either.

Overall, many respondents believe that if their firm or major client increased its ADR use, they would not be personally affected. To the extent that they do expect any effects of greater ADR use, the three types of respondents perceive different consequences. As a group, outside counsel reflect greater variation and somewhat more misgivings about personal consequences of increased ADR use than the other two types of respondents. For example, of the outside counsel who believe that increased ADR use by a major business client *would* affect their compensation, roughly equal proportions believe that greater ADR use would increase their compensation as believe that it would decrease it. One commonly-held view among outside counsel is that increased use of ADR would lose advantages for their clients and themselves; thus, these lawyers may be reluctant to suggest it. Here, a general counsel describes this perspective of outside counsel by contrasting it with perspectives of inside counsel:

It's always difficult getting attorneys to make a move that they think might lose them some advantage. That may be more the case if you're dealing with outside attorneys than with inside counsel where you have perhaps more of a feeling that you're making a determination strictly on a legal basis and your duty to vigorously defend your client. I'll take the charitable approach to that. There's also the perspective of how does that cut into [their] business as opposed to someone who's inside the corporation who's not looking at it necessarily from quite that strong of a perspective but is looking at all the business interests . . . of the company.¹⁴⁶

Some attorneys distinguish short-term and long-term consequences of ADR use, suggesting that outside counsel and their law firms might lose fees in the short-term but gain in the long-term due to enhanced reputations and increased referrals. The division of opinion between outside counsel in the phone survey may be a reflection of some who focused on perceived short-term losses and others who focused on longer-term gains. One outside counsel described the differences this way:

[If] I suggested ADR and as a result we settled the case without spending gobs of money on lawyers, I suppose it could have a

146. Interview with inside counsel 4 (Mar. 16, 1994).

negative effect on my compensation in the sense that there's been less legal work generated and so less fees generated and therefore less income. On the other hand, if you get a good result and you have a happy client and word gets out, long-term maybe that ends up being to your benefit because you'll have more business coming in because you've gotten a good economical result for the client. They haven't had any experience with, "Oh my God, we spent \$1 million in legal fees on that firm."¹⁴⁷

A senior partner in a law firm elaborated on the consequences of suggesting ADR in his firm:

Question: Do you think that suggesting or using ADR affects your prestige with your colleagues, supervisors, or clients?

Answer: I think it helps. I think to have a reputation for being able to solve your clients' problems is the best reputation to have with colleagues.

Question: Do you think that lawyers suggesting or using ADR, for example within this firm or others like it, would affect their opportunities for advancement?

Answer: We like ADR. . . . We've made a commitment to familiarize ourselves with the processes and to bring them to our clients' attention. If I were to find out that one of my associates had an opportunity to do that and didn't do it, I'd be unhappy.¹⁴⁸

Similarly, substantial numbers of executives see a potential for increased autonomy and work satisfaction, and many inside counsel see potential advantages in terms of advancement, prestige, autonomy, and opportunities to do satisfying work. One attorney suggested that if a business used ADR, it would reflect well on both the inside counsel and top executives. Like the preceding accounts of the outside counsel, this assessment is based on a recurrent assumption that the business using ADR would receive at least as good results, but with reduced time and expense:¹⁴⁹

[If a business used ADR regularly] I think the business presidents, maybe the general counsel too, [in other companies] would say, "That's a smartly run company because they're not spending all of this money on legal fees." . . . They would have to be high on an esteem list. And their general counsel and the president of that company would be the hero. Here's a guy or a woman who's got a company that's clicking. They know their

147. Interview with outside counsel 4 (Mar. 18, 1994).

148. Interview with outside counsel 1 (Mar. 17, 1994).

149. About 75% of all three types of respondents believe that mediated cases are resolved faster and at less cost than cases without mediation. *See infra* Part V.D.

expenses. They're not afraid to protect their rights, but they do it in a sensible way.¹⁵⁰

In sum, large proportions of respondents do not think that greater ADR use would affect them personally. To the extent that they expect a change, more inside counsel and executives expect that the change would be favorable than unfavorable, whereas the outside counsel are more divided.

D. *Time and Expense of Mediation*

ADR is frequently advertised as producing advantages over litigation, generally regarding the costs and time involved in disputing.¹⁵¹ Respondents in this study were asked, "Considering how long you think that lawsuits should take realistically, in lawsuits where mediation is used, how often are the suits resolved within an appropriate amount of time?"¹⁵² They were then asked a similar question about how often suits are resolved at an appropriate cost. Respondents generally agree that cases handled in mediation are often resolved within appropriate periods of time and at appropriate costs. Most respondents think that *more than half* of these cases are resolved at appropriate cost (56%) and within appropriate time (55%), and an additional 19% of respondents think that *half* of these cases are appropriate in cost and time.¹⁵³ Responses to these two questions are highly correlated ($r = .70$).

The responses to these questions provide good illustrations of differences in opinions about the courts and ADR. Comparing responses to questions about lawsuits with and without the references to mediation reveals that more than three-quarters of respondents believe that mediation provides time (81%) and cost (80%) advantages over

150. Interview with inside counsel 2 (Mar. 2, 1994).

151. See, e.g., GOLDBERG ET AL., *supra* note 5, at 8; Galanter & Lande, *supra* note 37, at 395-97.

152. This was the same question that was asked earlier in the survey about litigation, except that this question includes the phrase "in lawsuits where mediation is used." Since it is commonplace to complain about the cost and delay of litigation, the question included the prefatory phrase asking respondents to judge based on what they believed to be *realistic* expectations.

153. In the RAND study, the attorneys were generally satisfied with the time and expense of mediated cases but the litigants were more mixed. The vast majority of attorneys said that the case took a reasonable amount of time (84%) and the attorneys fees and costs were about right (75%), compared with only 49% of litigants who said that the amount of time was reasonable and 42% who said that the attorneys fees and costs were about right. KAKALIK ET AL., *supra* note 119, at 356, 360, 394, 397 (percentages based on number of valid responses). The RAND Report does not report significance tests comparing mediated and unmediated cases, though the reported frequencies look quite similar to each other. See *id.*

litigation in which mediation is not used.¹⁵⁴ Only eight percent gave responses indicating that the appropriateness of the time and expense of lawsuits is greater without mediation than with it. As noted above, many lawyers and executives believe that ADR produces outcomes that are at least as favorable for businesses as litigation, but at a lower cost. An inside counsel said:

I think [businesses] should try [ADR] in every [case]. . . . It just makes a heck of a lot more sense. If you can resolve it face to face, sitting down just talking, businesspeople to businesspeople, you don't even have to have lawyers in the room. . . . I mean it's somebody to make people think about the consequences before they charge off the cliff. . . . You don't have all of those legal fees. And you probably come out with a better answer anyway. Litigated answers usually aren't very good.¹⁵⁵

One executive said, about cost advantages of ADR over litigation, "It's a hell of a lot less costly to go that route than to go through the costs of the legal system."¹⁵⁶ Another described how ADR provides relief from the frustrations of delay, expense, and uncertainty of adjudication:

I think we all know that the courts are so horribly crowded that the case loads just take forever. They drag on. You invariably get tremendous delays because the court must deal with felonies first and then you get to the civil people. You think you've got a date for next Friday and you're prepared to go on next Friday. You've brought in your witnesses and the court says, "I can't

154. This is similar to the finding that 63% of lawyers in a random sample of Indiana State Bar Association members believe that mediation significantly reduces the time necessary for a civil non-family case to be concluded. Sixty-one percent disagreed with the notion that mediation tends to add significantly to costs. See Medley & Schellenberg, *supra* note 119, at 190. In the survey of Minnesota attorneys, 68% said that they voluntarily choose mediation because it saves litigation expenses, the largest single reason cited. See McAdoo, *supra* note 111, at app. C-14. Forty-six percent said that mediation saves expenses for their clients, and 60% said that it causes earlier settlements. See *id.* at app. C-16. The Deloitte and Touche survey of outside and inside counsel found that saving time and expense were the most important reasons for using ADR methods and were rated as providing more satisfaction than other aspects of the processes such as avoiding precedents, using the expertise of third parties, and preserving relationships. DELOITTE AND TOUCHE, *supra* note 127, at 8-9. Unlike the Deloitte and Touche survey, which asked the same question about the importance of different aspects of disputing procedures, the questions in the present study asked different questions about these aspects of disputing procedures; thus, the results are not precisely comparable. A survey of 606 inside counsel of Fortune 1000 companies found that more than 80% believe that mediation saves time and money. See David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMPLOYMENT L. 133, 138 (1998).

155. Interview with inside counsel 2 (Mar. 2, 1994).

156. Interview with executive 2 (Apr. 8, 1994).

because I've got a drug dealer that we just captured and he's going up on Friday." "Okay, when am I going to go [to trial]?" "Well we don't really know. We'll let you know in September." That's not the way to run the railroad, but that's what we're up against. So yes, I would say in civil tort cases, I think that all of those should immediately be handled by people who can hear them right away, and who can handle them on a dispute resolution basis immediately. Because then you know where you're going before you even think about going through all of the terrible, terrible expense of going to court.¹⁵⁷

Some respondents temper their generally positive view of the cost-saving potential of ADR by noting the possibility of adding costs, however:

If [ADR is] non-binding, it is *costly* to do. And so the matter in dispute really has to be worth that kind of potential cost addition. . . . I don't know how you can do any of these ADR procedures without having really completed your discovery. And we all know that it is in the area of discovery that legal costs are in a runaway condition in the types of disputes you and I are talking about. Most, if not all, of that *is* done by the time you do an ADR.¹⁵⁸

Thus, while the respondents do not always believe that mediation saves time and money, most believe that it usually does.

E. *Relational Factors*

Preservation and rehabilitation of relationships is often cited as one of the distinctive potential advantages of mediation as compared with other disputing methods.¹⁵⁹ The respondents in this study generally believe that mediation is sensitive to business needs and helps preserve business relationships. Over three-quarters of respondents (80%) said that mediation helps preserve business relationships¹⁶⁰

157. Interview with executive 4 (Apr. 7, 1994).

158. Interview with outside counsel 3 (Mar. 23, 1994).

159. See, e.g., BUSH & FOLGER, *supra* note 7, at 20-22; see also Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 270-73 (1991).

160. These findings are consistent with a survey of 606 inside counsel of Fortune 1000 companies in which 59% said that one of the reasons they use mediation is to preserve relationships. See Lipsky & Seeber, *supra* note 154, at 139. Also consistent with these findings are the comments of one inside counsel interviewed for McEwen's study of business disputing, who said, "Most disputes are resolved immediately in the interest of the relationship." McEwen, *supra* note 119, at 14. Zariski also found that 77% of the attorneys responding to his survey agreed that business relationships involved in commercial disputes are preserved better by non-judicial dispute resolution processes than by judicial processes. See Zariski, *supra* note 5. Possibly contrary to

and two-thirds (67%) said that mediators and arbitrators generally consider the needs and practices of particular business communities.¹⁶¹ Responses to these two questions are significantly correlated ($r = .41$), reflecting the importance of business relationships to business lawyers and executives.¹⁶² Respondents overwhelmingly believe that ADR is much more sensitive to business concerns than the courts are. More than three-quarters (82%) gave higher ratings of sensitivity to business needs and practices in a question about mediators and arbitrators than in a comparable question about the legal system generally.

Respondents were asked another question that tapped the extent to which they valued ADR for non-economic reasons. They were asked the extent to which they agree or disagree with the statement, "If ADR procedures take as much time and money as the courts, businesses generally would be better off using the courts to resolve their disputes."¹⁶³ Overall, the respondents were closely divided, with 38% saying that businesses would not be better off using the courts and 42% saying that businesses would be better off using the courts in these circumstances. Perhaps surprisingly, more outside counsel (47%) favored using alternatives to the courts than did the executives (33%) in these situations. As usual, inside counsel's responses were in between (43%) and not significantly different from the other two

the results in this article, only 14% of Minnesota attorneys said that they voluntarily chose mediation because it helps preserve parties' relationships, although 62% report that mediation is less adversarial than normal civil litigation. See McAdoo, *supra* note 111, at app. C-14, C-16. This difference may reflect a difference between conscious reasons for choosing a dispute resolution procedure and expected or observed consequences of using the procedure. Somewhat contrary to the results presented in this article, only 28% of attorneys in the RAND study said that mediation was helpful in improving relationships, compared with 63% who said that it had no effect. KAKALIK ET AL., *supra* note 119, at 367 (percentages based on number of valid responses). Similarly, in the Deloitte and Touche survey of outside and inside counsel, respondents did not indicate that preserving relationships is an important reason for using ADR. The Deloitte and Touche study also indicates that counsel were not as satisfied with ADR in terms of preserving relationships as with other consequences such as saving time and money. DELOITTE & TOUCHE, *supra* note 127, at 8-9.

161. When asked whether businesses should routinely consider using ADR for their disputes, an executive responded affirmatively, giving several reasons, including the following: "It gets it into the hands of businesspeople that understand business and understand the effects of what's going on like in a business." Interview with executive 2 (Apr. 8, 1994).

162. One executive highlighted this quite directly when asked about important factors in making decisions about business disputes. He said, "I think that continuing relationships are very very important. You've got to make a decision whether you want it to continue or not." Interview with executive 2 (Apr. 8, 1994).

163. In fact, most respondents do not accept the premise of this question about time and cost of mediation being the same as litigation generally. See *supra* Part V.D.

types of respondents. The average response for outside counsel is 5.0 on the 0 to 10 scale, suggesting ambivalence as a group. This compares with an average of 6.2 for executives, indicating a general preference for the courts in these situations. The average for inside counsel is 5.4, suggesting a slight preference for the courts as a group.

The survey included two other questions that did not specifically mention ADR procedures, but referred to benefits that are frequently attributed to mediation. In one question, respondents were asked how often is it appropriate for businesses to try to find outcomes addressing the underlying interests of each party as opposed to seeking the largest possible concessions. Although interest-based negotiation is certainly not limited to mediation,¹⁶⁴ mediation is often touted as providing greater opportunities for using this approach.¹⁶⁵ The socially desirable response for many people would be to state a very high frequency, as it might seem selfish to tell a researcher that one prefers to seek large concessions. To try to reduce this possible social desirability effect, the question was prefaced with the phrase, "given the practical realities of litigation between two businesses" Nonetheless, more than three-quarters (82%) of each type of respondent said that it would be appropriate to seek outcomes addressing underlying interests in more than half the cases. Although the outside counsel gave significantly higher responses (an average rating of 8.1) than executives (who gave an average rating of 7.2), clearly the vast majority of all three types of respondents said that it is normally appropriate to focus on underlying interests.¹⁶⁶ One executive gave an illustrative hypothetical situation:

The last thing you want to do is sue one of your regulators, even though you're right under the law. This is not the thing to do. You pick up the phone and you call George [last name] and you say, "George, I'm having a problem within the bowels of your organization. We think we're right. Our lawyers want to bring a lawsuit, but I'd like to sit down and talk to you to you to see if we can find a win-win here and interpret this thing." A lawsuit is messy and polarizes people.¹⁶⁷

164. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) (advocating this approach in unmediated negotiation).

165. See, e.g., MOORE, *supra* note 13, at 252-56.

166. Cf. JONATHAN M. HYMAN ET AL., *CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION* 63-64 (1995) (relating that 61% of attorneys in the survey say that they would like to increase their use of problem-solving methods in negotiation).

167. Interview with executive 3 (Apr. 15, 1994).

Referring to suits between two businesses, respondents were also asked "how often is it appropriate to reach a settlement involving outcomes other than, or in addition to, monetary payments?"¹⁶⁸ Providing creative solutions that are not limited to monetary outcomes is another widely cited benefit of mediation.¹⁶⁹ Again, there was the potential for socially desirable responses, so this question needs to be interpreted carefully. More than half (53%) of all types of respondents said that non-monetary outcomes would be appropriate in *more than half* of cases and an additional 28% percent said that non-monetary outcomes are appropriate in *half* of cases.¹⁷⁰ There were no significant differences in average responses of the three types of respondents.

From the responses to the preceding set of questions, it seems clear that most respondents accept claims about mediation regarding improving relationships, sensitivity to parties' interests, and valuing efforts to craft solutions addressing those interests. In such cases,

168. The question was prefaced with the following statement: "Many lawsuits between two businesses are resolved by having the defendant make a payment to the plaintiff. Some lawsuits are resolved by means other than or *in addition to direct monetary payments*, such as by negotiation of a contract."

169. See, e.g., GOLDBERG ET AL., *supra* note 5, at 8. In the RAND study, attorneys reported resolutions with non-monetary outcomes in about 14% of the mediated cases and in about 10% of unmediated cases. KAKALIK ET AL., *supra* note 119, at 360 (percentages based on number of valid responses). It is not clear whether this difference is statistically significant, though it suggests that participants do not frequently agree to non-monetary terms in agreements in general civil mediation programs like the ones studied by RAND. In McAdoo's survey of Minnesota lawyers, 6% said that settlements reached through ADR frequently or always include more non-monetary elements than non-ADR settlements, and 34% said that ADR settlements occasionally include more non-monetary elements. See McAdoo, *supra* note 111, at C-13.

170. Cf. HYMAN ET AL., *supra* note 166, at 62-64 (finding that most attorneys in survey say that they would like to consider creative positional and problem-solving options in negotiation). One executive in the present study gave an enthusiastic analysis about why disputes in ADR should be more prone to resolutions involving a non-monetary component than traditional litigation:

The attorney taking the case, if they're not skilled or knowledgeable in the particular industry or the commercial transaction, what else do they have to go by? By some concept of dollars. And in theory, everything has a value or we seek to put a monetary value on it. It's a common denominator, a market clearing price that has a lot of merit in that perspective. But, I can only wonder how many commercial disputes sort of hang out there, clog[ging] up the courts and society because everybody has this paradigm that we're talking dollars as opposed to maybe we could use this dispute as an opportunity to redefine our relationship. Or instead of it getting you to cut the price or interpret the contract in such a way that I pay less, maybe we could extend the contract for two years or something. In other words look for win-win. Get to win-win as opposed to litigate to win-lose. It's a hell of a difference.

Interview with executive 3 (Apr. 15, 1994).

one might expect that top business executives would be satisfied with the results. Indeed, respondents generally believe that business executives are satisfied with the results of lawsuits in which mediation is used. Overall, more than three-quarters (84%) of the respondents believe that top executives are satisfied in at least half the cases. Comparing responses to this question and the same question without reference to mediation reveals that about two-thirds of respondents (68%) gave higher ratings of executives' satisfaction with mediated results compared with 13% who gave higher ratings for the results of litigation generally.

This question was originally intended as a catchall indicator of favorability of results of the respective processes. Since top executives are typically the ultimate authorities to be satisfied in business matters, their judgments (as perceived by respondents) were thought to be a good standard for measuring outcomes. Not surprisingly, however, many respondents seemed to focus on executives' reactions and interactions with others in their organization. Therefore, this question may indicate at least as much about effects on intra-organizational relationships as on evaluations of dispute results.¹⁷¹ Indeed, this factor is significantly correlated with the perception that mediation helps preserve relationships ($r = .38$).

One inside counsel provided some insight as to why mediation may be more satisfying to executives—and the lawyers who represent them—than traditional litigation:

Sometimes businesspeople may intuitively know or have a belief that there may have been a mistake made, but it's very hard for them to go to their superior and say, "Look, we're wrong here." If a third party—not the other side, because they're the devil, but if a truly neutral third party—can objectively and cogently state why [you're wrong], it's a lot easier to go back and say,

171. Perhaps not surprisingly, many respondents consider the economic and relational factors together, as much as researchers seek to separate them. Here, an executive describes the factors he believes are most important in making decisions about business disputes:

Looking at the economic results, the more important factors to a businessperson, or certainly to me, is not just are we going to win the litigation, do we have a right to do it, can we do it, but are we going to spend more money doing it than the result? Having done it, is it going to give us a long-term problem that we don't want to live with? Is it going to damage our reputation? . . . So the bottom line is that many times we don't sue (a) when we know that even if we get a judgment we can't collect, or (b) having done that, we'll lose the customer, which is basically one of your questions, and damage other relationships, or (c) this litigation could go on just forever and ever and there's an open-ended problem there.

Interview with executive 4 (Apr. 7, 1994).

"Well, so-and-so's a judge and he or she is like the judge who's going to hear this and they say we've got a problem here." You know, people are more accepting of objective advice and I think once you start that process and there is a recognition of relative fault—yours and others'—it's a beginning to starting a true dialogue.¹⁷²

Although executives presumably do not like to be told that they are wrong, they also presumably recognize that in some cases they may be wrong legally and/or likely to lose their case. While they cannot trust the evaluation of their opponents, executives also may not trust (or want) their own attorneys to provide a nonpartisan evaluation.¹⁷³ Thus, executives may indeed value a process where they will sometimes be told that they are wrong *and* can really believe it. Of course, they may especially value such a process if the ADR neutral tells the executives' *opponents* that the opponents are wrong. For example, one attorney described a case in which an ADR proceeding affected the opposing party's evaluation of the case, thus facilitating settlement:

I'm thinking of one particular example where there was clearly some exposure on the part of my client. We were the defendant. . . . The plaintiff was completely unrealistic about the merits of his claim and particularly about his damage claim and what he was likely to recover. This is a case where we went through the summary jury trial¹⁷⁴ and the result of that was that there was a finding of liability but an award of damages that was in the neighborhood of what we had always expected would be an appropriate damage award and at least a decimal point away from what the plaintiff had ever been at before in

172. Interview with inside counsel 3 (Mar. 9, 1994). Cf. McEwen et al., *supra* note 87, at 164-67 (noting how divorce attorneys have a difficult time giving clients bad news about a case, and how mediation helps by having a mediator and the opposing side help the client see the case more clearly).

This quote refers to an "evaluative" version of mediation in which mediators express opinions about the merits of the case. Evaluative mediation is quite controversial. See Lande *supra* note 1, at 850-851. It is also probably quite common, especially in civil mediation.

173. Cf. SARAT & FELSTINER, *supra* note 54, at 26-52 (finding, in divorce cases at least, that it is not unusual for clients to doubt their attorneys' assessments and advice).

174. As this passage suggests, a summary jury trial involves brief presentations to a jury that renders a non-binding decision. The decision is used as the basis for further negotiations. See GOLBERG ET AL., *supra* note 5, at 286. This is somewhat similar to an evaluative form of mediation in which mediators provide their assessments of the merits of the case to focus negotiations in particular directions. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 44-45 (1996).

terms of settlement. . . . I consider that to be a favorable result for my client even though we ended up spending approximately a quarter of a million dollars in settlement. Before that time, we just couldn't get the plaintiff down under two million dollars.¹⁷⁵

Thus, mediation can help attorneys and executives solve the organizational problem of rationalizing settlements to clients.¹⁷⁶ The preceding two quotes suggest that the attorneys believe that the formal outcomes were about the same as they would have been if they had been tried in court. When respondents speak about more favorable outcomes, they may be factoring in the traditional benefits of settlement, such as reduced risk and litigation costs. Of course, settlement conferences conducted by sitting public judges often serve this purpose as well.¹⁷⁷ Perhaps respondents believe that mediators perform this function more often or better than judges in court settlement conferences. Part of the confidence in mediation may be based on the premise that it is conducted early in the dispute before "you've already engaged in all of the 20 or 30 depositions etc. [and] you've spent all the money,"¹⁷⁸ whereas judicial settlement conferences often occur late in the dispute.¹⁷⁹ Indeed, it may be easier to use this third-party neutral opinion to help persuade top executives to settle if it is obtained before the firm is substantially invested in the dispute both financially and psychologically.

The findings in this Part indicate that business lawyers and executives generally believe that mediation improves relationships and is oriented to the interests of the parties (at least the interests of the business entities). For many, considerations such as these would justify using mediation even without time or cost savings.

F. *Level of Specialized Skill and Knowledge Involved in Mediation*

One might generally assume that professional mediators claim, implicitly or explicitly, that they offer a service requiring some special skill or knowledge. If not, why would parties invest their time and money to engage the mediators' services? Why not simply go to

175. Interview with outside counsel 4 (Mar. 18, 1994).

176. See McEwen et al., *supra* note 87, at 164-67.

177. See generally WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1985).

178. Interview with inside counsel 3 (Mar. 9, 1994).

179. The assumption of ADR proceedings occurring early in the dispute is not always warranted, especially when ADR is mandated by the courts. Some respondents said that in their courts, they went to court-ordered mediation late in the process and thus did not gain the benefits of early resolution.

a bartender or hairdresser for help in resolving disputes? While specialized skill and knowledge seem like generally plausible (at least perceived) requirements for most professional services,¹⁸⁰ this may be less so for mediation, which primarily involves negotiation. Consider that even young children negotiate on a regular basis (often with favorable results, as most parents can probably attest). On the other hand, given a general distaste for the litigation process and its complexity, many people might prefer a simpler approach to mediation that seems like "common sense." To test this, the survey asked whether respondents think that "knowledge about mediation procedures is more a matter of common sense or specialized skill and learning."

The business lawyers and executives in this study think that mediation involves a mix of common sense and specialized skill and knowledge, with most responses centering around the midpoint of the 11-point rating scale. Overall, the responses lean toward the specialized end of the continuum with somewhat less than half (44%) of respondents saying that mediation involves more specialized skill and knowledge compared with about a quarter (23%) who say it is more a matter of common sense.

For some people, being a mediator (or providing other ADR services) is just like any other profession, i.e., one requiring specialized knowledge and skills. One executive stated, "If my job is to go and build bridges, I need to approach my first bridge with some specialized training in how to do load calculations. That's just training to get to the table to practice my profession. I would see dispute resolution the same way."¹⁸¹

Unlike the skills in building bridges, however, negotiation and problem-solving skills are part of the stock-and-trade of lawyers and executives. Thus, part of the rationale that mediation (or perhaps what is considered to be *good* mediation) primarily requires common sense may be based on the notion that the skills required to be a mediator are similar to the specialized skills that lawyers develop. For example, one lawyer described his experience with ADR that led him to believe that it involves special skills:

I don't think it's more common sense. . . . Certainly the first time I was exposed to it, I was surprised how a formalized sort

180. For discussion of the importance of claims of specialized knowledge and skill for professional legitimacy, see *supra*, Part II.A.

181. Interview with executive 3 (Apr. 15, 1994).

of structure like a mini-trial¹⁸² would actually move people towards a resolution [rather] than otherwise. Common sense might tell us that it should be resolved, but the problem, mechanically, is how you bring them to see it in the right way. . . . And I don't think there are skills remarkably different from litigation skills involved in being the advocate in the ADR process.¹⁸³

Interestingly, another attorney used similar reasoning to reach the opposite conclusion:

[I think it is more] common sense. You go to seminars that talk about negotiation techniques and my view is that if 90% of what they're telling you doesn't strike you as just being plain old common sense, you're probably going to have a hell of a time being an effective negotiator anyway. Because if you have to try to learn all this stuff and it doesn't come second nature to you, it's going to be difficult. And the best negotiators are people that I think are *naturally* someone who isn't going to respond to everything you've said by taking the bait and finding the points of contention.¹⁸⁴

Another attorney gave a similar, but more concise, no-nonsense perspective on this question: "Specialized skills is a bunch of hogwash. What sounds reasonable and fair? Rights are rights and liabilities are liabilities."¹⁸⁵ Some respondents may have indicated that knowledge about mediation itself is more common sense, but may value specialized skill in the subject of the dispute:

Well, if you get knowledgeable people in the field that you're dealing with, let's say there's a dispute in microbiology. [Courts should consider referring cases to ADR if it's to] people that are familiar with that field in that they can understand the depths of the field and also that understand the parameters involved in handling a dispute. How do you handle the economics?¹⁸⁶

182. Mini-trials have a somewhat misleading name, as the prescribed form is closer to mediation than a trial. They are typically used in disputes between two businesses or other organizations and involve a panel composed of top executives from both entities. Attorneys for each side give summaries of their legal arguments and then the panel, with the assistance of a neutral advisor, attempts to negotiate a settlement. See GOLDBERG ET AL., *supra* note 5, at 281-83.

183. Interview with outside counsel 1 (Mar. 17, 1994).

184. Interview with outside counsel 4 (Mar. 18, 1994). This quote reflects a common confusion between skills used in negotiation and mediation, which are generally quite similar, albeit with some differences.

185. Interview with inside counsel 2 (Mar. 2, 1994).

186. Interview with executive 2 (Apr. 7, 1994). Indeed, knowledge of the substantive area of a dispute was the important qualification mentioned most often (84%) by Minnesota attorneys in McAdoo's study. About 66% said that the mediator being a

These responses indicate that business lawyers and executives believe that mediation involves a mix of specialized skill and common sense. Overall, it may involve more specialized skill, but it still entails a healthy dose of common sense, according to the respondents.

G. *Perception of Leaders' Opinions*

One might expect that respondents' opinions would be related to the perceived opinions of their professional leaders and organizational superiors. This Part examines perceived opinions of these key actors about ADR and relates them to respondents' own views.¹⁸⁷

Respondents were asked whether they thought that organizational superiors and professional leaders¹⁸⁸ have favorable or unfavorable opinions about ADR. The patterns of responses are generally parallel to the pattern of the respondents' own opinions about ADR. The perceived opinions of organizational superiors and professional leaders about ADR are generally favorable. The lawyers (especially the outside counsel) more than the executives, tend to believe that these leaders have favorable opinions about ADR.

Overall, a majority of respondents said that their organizational superiors have favorable opinions about ADR. This includes about 60% of inside and outside counsel and 43% of the executives, although the difference in average response between types of respondents is not quite statistically significant. One-fifth or less of all three groups said that they thought that their organizational superiors had unfavorable views of ADR.

Respondents generally believe that the *leaders in their profession* also have favorable opinions about ADR. Overall, about two-thirds of respondents gave this response. A somewhat larger percentage of outside counsel (77%) than inside counsel (63%) and executives (51%) said that their professional leaders have favorable views of ADR. This difference may be due to executives' relative unfamiliarity with ADR in their own right as well as uncertainty about others' opinions.

litigator is an important qualification, and only 43% said having mediation training is an important qualification. McAdoo, *supra* note 111, at C-19.

187. For reasons why respondents' opinions may be linked to those of organizational and professional leaders, see *supra* Part II.A, discussing professional leaders' increased interest in ADR.

188. For definition of "organizational superior" as used in this study, see *supra* Part IV.A. As indicated in Part IV.A, some but not all of the organizational superiors are "top executives" referred to in a question analyzed in Part V.E.

As noted in Part II.B, *supra*, there has been a national campaign for businesses and law firms to adopt policies calling for consideration of ADR in business disputes. Obviously, such policies or organizational practices might contribute to a belief in mediation by the respondents. About a third of all three types of respondents say that their firm has a formal or informal policy to consider using ADR in its disputes (36%), or to use ADR contract clauses (34%).¹⁸⁹ Respondents' reports about the existence of two types of policies in their firms are significantly correlated ($r = .50$). Relatively few respondents reported that their firms adopted *official* policies directing consideration of ADR (15%) or use of ADR clauses (10%), and there were not significant differences between types of respondents in this regard. More often, respondents said that their firms had adopted such practices without official policies; 21% reported unofficial policies favoring consideration of ADR, and 24% reported unofficial policies favoring use of ADR contract clauses. Of course, such policies do not necessarily translate completely into practice. Amount of experience as a partisan in ADR is only weakly correlated with a firm's policy to consider using ADR ($r = .17$) and is not significantly correlated with a policy of using ADR contract clauses. As one attorney put it, "A lot of [top business executives] have signed the CPR pledge themselves. Again, I don't always see them as willing once a dispute begins to get into them. In theory, that's the thing to be in favor of."¹⁹⁰

These findings indicate that respondents generally believe that the leaders of their professions and their organizational superiors

189. ADR contract clauses provide for ADR procedures to be used if there is a dispute arising from the contract. Outside counsel were asked about the contracts that their firms' attorneys draft. Inside counsel and executives were asked about the contracts used by their firms. It is possible that more firms have policies or practices to use ADR clauses than is reflected in this survey. Many of the outside counsel are in litigation departments, and some said that contracts would typically be drafted by attorneys in other departments and that they (the respondents) would not necessarily be aware of such policies or practices. Similarly, executives may not be aware of dispute resolution clauses in contracts or a generic ADR policy.

The Zariski survey of Western Australia attorneys found that 45% reported that their firms had an official or unofficial policy to consider using ADR, while 43% reported having no such policy. Thirty-one percent said that there was an official or unofficial policy to use ADR clauses in contracts, while 37% said that there was no such policy. Zariski, *supra* note 5.

190. Interview with outside counsel 1 (Mar. 17, 1994). McEwen found a similar phenomenon with some inside counsel in his study of six corporations. McEwen, *supra* note 119, at 13 (quoting an attorney: "We are pro-ADR in theory but when you get down to specifics, it's a hard pill to swallow. We haven't seen many opportunities to use it."). McEwen generally found a lack of connection between corporate ADR policy and actual ADR usage. Of the six corporations he studied, two rarely initiated ADR, two did so occasionally, and two were strongly committed to ADR, especially

have favorable opinions about ADR, and that about one-third of respondents are aware of policies in their organizations favoring use of ADR in business disputes. There is not a strong correlation between existence of these policies and respondents' perceptions that their organizational superiors have favorable views of mediation, indicating that respondents rely on other cues in assessing the leaders' views.

VI. CORRELATES OF BELIEF IN MEDIATION

This Part analyzes correlations of belief in mediation with the variables described in the preceding Part to help explain why business lawyers and executives support mediation (at least rhetorically) as much as they do.¹⁹¹ This analysis shows that belief in mediation is primarily related to opinions about ADR, rather than criticism of litigation. More generally, belief in mediation is largely related to factors suggesting a desire to improve important relationships.

For ease of presentation, related variables are grouped together. The first table includes demographic, organizational and professional variables. The second table includes variables describing respondents' disputing experience. The third and fourth tables include variables reflecting respondents' opinions about the courts and ADR, respectively. Most of the tables include variables with data from all three types of respondents. However, several models exclude some types of respondent because the variables are not appropriate or comparable for the different types of respondents. For example, measures of organization size are quite different for outside counsel

mediation. These differences were observed despite the fact that five of the six corporations had signed an ADR pledge sponsored by the CPR Institute for Dispute Resolution. *Id.* at 5. For more information about the CPR pledge, see *supra* note 22 and accompanying text.

191. Ideally, one would hope that a survey like this would provide strong evidence about what "causes" people to believe in mediation. This study does provide evidence that is quite suggestive, but it is not sufficient to support claims of causation. A basic element for establishing causality is called "causal order." It is impossible to determine the causal order of the subjective measures given the cross-sectional research design (i.e., where all the data were collected at a single point in time for each respondent). Even when causal order is not problematic, correlations in themselves do not prove causation because the correlations may be "spurious." An association is spurious when the two associated (but actually independent) events are both caused by the same prior cause. For example, there may a correlation between the volume of swimsuit sales and number of drowning deaths, but this would not prove that the sales caused the deaths or vice versa; presumably they are both caused in part by the amount of swimming associated with the swimming season. When there is *not* an association between two variables, one can generally conclude that there is not a causal relationship between them. For further discussion of causal inferences based on this study, see Lande, *Ideology of Disputing*, *supra* note 95, at 59-64.

(relating to law firms) and inside counsel and executives (relating to their businesses). Similarly, different measures of amount of litigation experience were used for the attorneys and executives.

A. Background Variables

Few of the background variables are significantly correlated with belief in mediation (see Table 4). In particular, most of the demographic and organizational variables are not significantly correlated, nor are most of the variables reflecting respondents' disputing experience. For example, belief in mediation is not related to age, status of law school, length of career, tenure in one's current position, or tenure in one's profession.¹⁹² There was a weak correlation between executives' belief in mediation and their political ideologies, with self-identified liberals supporting mediation more than conservatives.

Belief in mediation is related to some aspects of respondents' experience with disputing, especially experience with ADR, though there is no variable involving disputing experience that is related to belief in mediation for more than one type of respondent (see Table

Table 4. Correlations Between Belief in Mediation and Personal and Organizational Characteristics			
Variable	Outside Counsel	Inside Counsel	Executives
Age	.08	.17	.02
Political conservatism	.00	.10	-.26*
Length of professional career	.01	.06	.00
Tenure with current firm	.01	-.01	-.14
Number of employees in firm	—	-.20	-.06
Number of attorneys in law firm	.07	—	—
Status of law school alma mater	.14	.09	—

* $p < .05$

192. These findings are at odds with a survey of Indiana attorneys in which favorable views on a civil mediation scale are significantly correlated with age and being in a group practice. Younger lawyers and those in group practice generally have more favorable views of mediation than older lawyers and those who practice alone. See Medley & Schellenberg, *supra* note 119, at 193-95. For information on the status of the attorneys' law school alma mater, see Land *Ideology of Disputing*, *supra* note 95, at 75.

5). The strongest relationships are between the amount of outside counsel's experience as neutrals and (even more so as) partisans in ADR procedures. The greater the amount of ADR experience, the greater their belief in mediation.¹⁹³ One might hypothesize that this is connected to greater belief in mediation by respondents most often in the role of (or representing) defendants, but these two variables are significantly correlated only for inside counsel, not outside counsel or executives. Indeed, inside counsel whose firms are *more often* defendants expressed *less* belief in mediation than inside counsel whose firms are *less often* defendants. For executives, none of the variables relating to disputing experience is related to belief in mediation.

Table 5. Correlations Between Belief in Mediation and Experience with Litigation and ADR			
Variable	Outside Counsel	Inside Counsel	Executives
Percentage of career in which at least half of time was devoted to litigation	.03	.03	—
Percentage of time in prior 12 months devoted to litigation	.22	.08	—
Number of cases as witness or juror	—	—	.27
Number of cases as party	—	—	.26
Number of cases as decision maker	—	—	-.04
Percentage of cases as defendant	-.04	-.28*	-.11
Percentage of clients that are businesses	.22	—	—
Number of cases as neutral in ADR	.31**	-.01	-.13
Number of cases as partisan in ADR	.43**	.09	.12

* $p < .05$ ** $p < .01$

193. This finding is consistent with the survey of Indiana lawyers in which favorable attitudes on a civil mediation scale are significantly correlated with amount of mediation experience (apparently as a partisan). See Medley & Schellenberg, *supra* note 119, at 194-95.

Table 6. Correlations Between Belief in Mediation and Sources of Information about ADR			
	Outside Counsel	Inside Counsel	Executives
Personal experience with ADR	.35**	.18	.16
Colleagues in their firm	.05	.12	.33*
Colleagues not in their firm	.13	.02	.26
Lawyers (executives only)	—	—	.03
ADR providers	-.06	.10	.00
Professional school	-.09	-.22	-.03
Continuing education	.05	-.04	.01
Professional publications	.07	.03	.04
Total amount of information	.17	-.02	.22

* $p < .05$ ** $p < .01$

Belief in mediation is generally not related to the amount of information about ADR that respondents have received overall,¹⁹⁴ or from particular sources (see Table 6). The major exception is that outside counsel's belief in mediation is significantly correlated to how much information about ADR they obtained from personal experience. This is consistent with findings that outside counsel's belief in mediation is significantly correlated with the number of cases in which they participated in ADR.¹⁹⁵ In addition, executives' belief in mediation is related to the amount of information that they received from colleagues other than lawyers, especially colleagues in their own firm. Overall, this suggests that simply the amount of information received about ADR is not in itself critical in generating belief in mediation.

B. *Opinions About Courts*

In everyday conversation, business executives and lawyers often frame their views about ADR by (often critical) reference to the courts. The statistical analysis of the survey responses in this study,

194. To calculate the total amount of information received, I calculated an average of responses to questions about how much information the respondents received from various sources. See *supra*, Part IV.C.

195. Not surprisingly, the amount of information that outside counsel (and the other respondents) reported receiving from personal experience is highly correlated to the number of cases in which they participated in ADR, especially as partisans. The only exception to this correlation is that the amount of information that executives received from personal experience is not significantly correlated with the number of cases in which they served as neutrals in ADR. This may be due to the fact that very few of the executives in the survey had much experience as a neutral.

by contrast, indicates surprisingly little connection between the two (see Table 7). There was no significant correlation between belief in mediation and satisfaction with respondents' personal experiences with litigation, either in terms of the results or process of litigation. Nor are there significant correlations with overall assessments of how well the court system has been working or specific aspects of the courts that are often used to justify use of mediation, such as the time and cost of litigation and uncertainty about the courts' abilities to find the truth and produce fair results. Only two correlations are statistically significant, and even these are fairly weak. Both of these correlations are only for outside counsel. These correlations are between belief in mediation and perceptions that (a) court decisions generally are unpredictable in lawsuits by individuals against businesses, and (b) litigation would generally be a poor way to resolve business disputes even if courts ran quickly and efficiently. It is worth noting that this is not an instrumental critique of the economics of litigation, but rather a critique of the more fundamental nature of litigation as a dispute resolution procedure. As a whole, these survey findings suggest that belief in mediation is not generally based on criticisms of the courts. There are, however, some findings that belief in mediation is related to favorable assessments of ADR relative to the courts, as described *infra* in Parts VI.C and VI.D.

C. *Opinions About ADR*

The statistical analysis suggests that the major factors relating to belief in mediation involve qualities of ADR itself rather than dissatisfaction with the courts. Both outside counsel and inside counsel who are more satisfied with their experiences in ADR have greater belief in mediation (see Table 8).¹⁹⁶ Surprisingly, correlations for these variables are not statistically significant for executives. For lawyers, belief in mediation seems to be based directly on evaluations of their ADR experiences rather than relative evaluations of their ADR experiences compared with their litigation experiences generally. I calculated the differences between the ratings of litigation and

196. Some questions referred specifically to mediation and others referred to ADR generally. See *supra* note 102. Thus, the difference in the referents in the questions might affect the results. For example, expected consequences of greater mediation use might be quite different than consequences of greater use of arbitration or ADR generally, and might produce different statistical relationships with belief in mediation. There is no obvious pattern based on matching of referents in the questions. Some but not all questions referring to ADR generally explain belief in mediation, and some questions specifically referring to mediation do not explain belief in mediation.

Table 7. Correlations Between Belief in Mediation and Opinions About Litigation			
Variable	Outside Counsel	Inside Counsel	Executives
Satisfaction with <i>results</i> in personal experience with litigation	.03	-.08	-.17
Satisfaction with <i>process</i> in personal experience with litigation	.02	-.03	-.16
How well courts have been working in past 10 years	.02	-.11	.04
Existence of a litigation explosion in past 10 years	.07	.10	-.16
Frequent suits so frivolous that they should not have been filed	.07	.06	-.03
Cases (in litigation) are often resolved at an appropriate cost	-.20	.02	-.12
Cases (in litigation) are often resolved within an appropriate amount of time	-.21	.00	-.03
Court results are often fair	-.10	-.06	.13
Courts are a good means of finding truth	.03	-.16	.03
Juries often do a good job of determining <i>liability</i>	.03	.10	.03
Juries often do a good job of assessing <i>damages</i>	-.01	.19	.24
Juries use a higher standard in judging businesses than individuals	.10	-.23	.11
Court decisions generally are predictable in suits by individuals against businesses	-.25*	.21	-.06
Litigation would be poor way to resolve business disputes even if courts ran quickly and efficiently	-.28*	-.05	-.24
How often business' top executives are satisfied with results of lawsuits involving a business	-.03	-.14	-.27
Lawsuits involving business divert resources from more productive activities	-.16	.00	.07
Courts consider needs of particular business communities	-.24	-.04	-.05

* $p < .05$

ADR regarding both results and process¹⁹⁷ and correlated these differences with belief in mediation. As Table 8 shows, correlations with the relative satisfaction for the attorneys were usually less than (and in one case, equal to) the correlations with the absolute satisfaction ratings of ADR experiences. The results here suggest that satisfaction with ADR experiences—at least for attorneys—may lead to generalized belief in mediation.

Table 8. Correlations Between Belief in Mediation and Satisfaction with ADR Experience

Variable	Outside Counsel	Inside Counsel	Executives
Satisfaction with <i>results</i> in their experiences with ADR	.38**	.28*	-.02
Satisfaction with <i>results</i> in their experiences with ADR <i>relative to results in their experiences with litigation</i>	.27*	.22	.24
Satisfaction with <i>process</i> in their experiences with ADR	.33**	.32*	.05
Satisfaction with <i>process</i> in their experiences with ADR <i>relative to process in their experiences with litigation</i>	.24	.32*	.06

* $p < .05$ ** $p < .01$

The pattern of relationships between belief in mediation and self-interested motivations related to ADR use¹⁹⁸ is unexpected (see Table 9). It is surprising that expected consequences relating to compensation, opportunities for advancement, and prestige are not significantly related to belief in mediation. It is especially surprising

197. For a description of the calculation of these ADR ratings relative to litigation ratings, see *supra* Part III.

198. The survey did not include questions asking respondents about their own motivations regarding ADR use, as it would have been socially undesirable for many respondents to acknowledge directly any self-interest in their attitude toward mediation, such as a belief that supporting or opposing mediation would increase their compensation. Although the questions that were included in the survey about expected effects of increased ADR use do not expressly ask about motivations to propose or use ADR, they are very suggestive about respondents' motivations. This is especially so where there is no significant relationship between expected consequences and belief in mediation. For example, if the expected effect on personal compensation does not predict belief in greater use of mediation, it seems implausible that people would be motivated to support (or oppose) mediation use because they want to earn more. This

because material self-interest has been suggested as an important factor why people would or would not support greater ADR use.¹⁹⁹ Lawyers and business executives are widely perceived to be especially materially self-interested. Lawyers—particularly private attorneys—are often seen as parasites and predators,²⁰⁰ and a fear of loss of income resulting from use of ADR is sometimes suggested as a reason why they might oppose its use.²⁰¹ Business executives are often seen as greedy, and given the perception that litigation is expensive and reduces corporate profits (which in turn might affect personal compensation packages for many executives), one might expect that executives would be strongly in favor of mediation. However, this study finds that respondents' expectations about effects on compensation, personal advancement, prestige, professional autonomy, and opportunities to do satisfying work are not related to their support of mediation.

Table 9. Correlations Between Belief in Mediation and Expected Personal Consequences of Increased ADR Use			
Variable	Outside Counsel	Inside Counsel	Executives
Increased compensation	-.22	.14	-.06
Increased opportunities for advancement	-.12	.13	-.07
Increased relative importance within their firm	.04	.13	.07
Increased ability to work independent of direction of colleagues in other professions	.11	.23	.28
Increased ability to do work they find very satisfying	.16	.25	.17

Some general beliefs about ADR are significantly related to belief in mediation (see Table 10). Consistent with repeated findings in the sociology of law literature about the significance of maintaining good

inference is especially compelling given that large segments of the sample do not believe that greater ADR use would have any effect on them personally. *See supra* Part V.C.

199. *See supra* Part II.B.

200. *See generally* Galanter, *supra* note 91.

201. As described in Part V.C, *supra*, these perceptions are often erroneous.

long-term relations in business relationships,²⁰² this study indicates that, for all three types of respondents, belief in mediation is significantly related to beliefs that mediation helps preserve business relationships. In addition, for all three types of respondents, belief in mediation is related to perceptions that mediation results satisfy corporate executives. For inside counsel and executives, the correlation is even stronger for perception of top executives' satisfaction with mediation results relative to litigation where mediation is not used. These are among the strongest correlations with belief in mediation found in this study. As noted above, the respondents' perceptions about top executives' satisfaction with mediation results seem to be indicative of respondents' sensitivity to intra-organizational relationships.²⁰³

There are several other opinions about ADR that are correlated with belief in mediation, almost all correlated for outside counsel only. Many of these correlations are with variables involving ratings of ADR relative to litigation.²⁰⁴ For outside counsel, there is a significant correlation between belief in mediation and perceptions that mediators and arbitrators generally consider the needs and practices of particular business communities. The correlation of belief in mediation is larger and more significant with the outside counsel's views of consideration of business needs and practices by mediators and arbitrators *relative to the legal system generally*. Interestingly, belief in mediation is not directly correlated to assessments of how often cases are resolved within an appropriate amount of time or for an appropriate amount of money in suits where mediation is used, but there are significant correlations with the ratings relative to suits where mediation is not used. But for outside counsel, belief in mediation transcends time and cost savings. One of the largest correlations is with the premise that businesses would be worse off using the courts even if ADR takes as much time and money as the courts.²⁰⁵ In sum,

202. See, e.g., Macaulay, *supra* note 57, at 62-65; Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & Soc'y REV. 719, 720-29 (1973).

203. See Part V.G.

204. For a description of how relative ratings were calculated, see *supra* Part III.

205. Respondents were asked to give ratings of agreement or disagreement with the statement "If ADR procedures take as much time and money as the courts, businesses generally would be better off using the courts to resolve their disputes." To provide ratings in which higher values reflected positive attitudes about ADR, the coding was "reversed" by subtracting the respondents' ratings from ten. In Table 10, the wording for this item was changed for greater clarity.

Table 10. Correlations Between Belief in Mediation and Specific Opinions About Mediation			
Variable	Outside Counsel	Inside Counsel	Executives
Mediation helps preserve business relationships	.37**	.36**	.35*
Business' top executives are often satisfied with the results in lawsuits where mediation is used	.40**	.33*	.38*
Business' top executives are often satisfied with the results in suits where mediation is used <i>relative to suits where mediation is not used</i>	.37**	.43**	.44**
Mediators and arbitrators generally consider needs and practices of particular business communities	.24*	.12	.01
Mediators and arbitrators generally consider needs and practices of particular business communities <i>relative to the legal system generally</i>	.34**	.15	.03
Cases are often resolved within an appropriate amount of time in lawsuits where mediation is used	.18	.21	-.03
Cases are often resolved within an appropriate amount of time in suits where mediation is used <i>relative to lawsuits generally</i>	.37**	.19	.05
Cases are often resolved at an appropriate cost in suits where mediation is used	.15	.23	.01
Cases are often resolved at an appropriate cost in suits where mediation is used <i>relative to lawsuits generally</i>	.32*	.20	.17
Businesses would be worse off using the courts even if ADR takes as much time and money as the courts	.39**	.20	.26
Knowledge about mediation procedures is more specialized skill and learning than common sense	-.12	.06	-.33*
Often appropriate to reach settlement involving outcomes other than or in addition to monetary payments	-.06	.23	.11
Often appropriate for businesses to try to find outcomes addressing parties' underlying interests	.02	.06	.06

*p < .05 ** p < .01

outside counsel's belief in mediation is related to both economic and non-economic factors.²⁰⁶

For inside counsel and executives, there are fewer opinions about ADR that are correlated with belief in mediation. Inside counsel's belief in mediation is significantly correlated only with the view that mediation helps preserve relationships. For executives, in addition to that correlation, belief in mediation is significantly correlated with the view that mediation is more a matter of common sense than specialized skill and knowledge. Executives generally find legal disputes to be confusing and distasteful.²⁰⁷ Thus, it seems plausible that their belief in a disputing procedure might be related to a perception that the procedure *simplifies* the dispute rather than making it even more complex.

D. *Perceptions of Leaders' Opinions About ADR*

Respondents' perceptions of whether their organizational superiors²⁰⁸ have favorable or unfavorable opinions about ADR are significantly correlated to respondents' belief in mediation, at least for the attorneys (see Table 11). This factor is not quite significantly related to belief in mediation for the executives. The correlations are similar for variables reflecting respondents' perceptions of organizational superiors' opinions about ADR relative to how well the court system has been working in the past 10 years. This factor is subject to several complementary interpretations. On one hand, agreeing with one's bosses is a time-honored method of promoting one's self-interests. On the other hand, sharing beliefs with one's superiors is a form of symbolic action of organizational commitment that may not

206. Multiple regression analyses of these variables' relationships with belief in mediation by outside counsel indicate that some variables are more directly related to belief in mediation than others. Variables that are more directly related to outside counsel's belief in mediation include opinions about whether mediation helps promote business relationships, whether mediators and arbitrators are more sensitive to businesses' needs and practices than the courts, and how often cases are resolved within an appropriate amount of time relative to the courts. Other variables are significantly correlated with outside counsel's belief in mediation when considered individually but are not significant when considered together with related variables, suggesting that the relationships are less direct between these variables and outside counsel's belief in mediation. These variables include opinions about whether businesses would be worse off using the courts even if ADR takes as much time and money as the courts and how often cases are resolved at an appropriate cost relative to the courts.

207. See Lande, *Failing Faith*, *supra* note 95, at 51-52.

208. For definition of "organizational superior" as used in this study, see *supra* Part IV.A. As indicated in Part IV.A, some, but not all, of the organizational superiors are "top executives" referred to in a question analyzed in Part VI.C.

be conscious or intentional and may be loosely linked (if at all) with influence efforts in contests for resources.²⁰⁹

Table 11. Correlations Between Belief in Mediation and Perceived Opinions of Organizational and Professional Leaders			
Variable	Outside Counsel	Inside Counsel	Executives
Organizational superiors have favorable opinions about ADR	.28*	.32*	.27
Organizational superiors have favorable opinions about ADR <i>relative to court system</i>	.22	.39*	.26
Professional leaders have favorable opinions about ADR	.16	.19	.34*
Professional leaders have favorable opinions about ADR <i>relative to court system</i>	-.01	.21	.34*
Respondent's firm has policy to consider using ADR in its disputes	-.06	-.07	-.06
Respondent's firm has policy to consider using ADR clauses in its contracts	.03	-.02	-.14

*p < .05

The existence of organizational policies about use of ADR in contracts or actual disputes (at least to the extent that respondents were aware of them) is not significantly correlated with belief in mediation (or even perceived opinions of organizational superiors). This suggests that adoption of such policies may be symbolic action without direct substantive actions or effects.²¹⁰

Perceived opinions of leaders in respondents' professions about ADR are not generally correlated with respondents' own beliefs in mediation. There is a significant correlation for executives, which is the same both directly and in relation to the perceived opinions of

209. See Pfeffer, *supra* note 67, at 34-38 (discussing the consequences of symbolic action). For an illustration of one respondent's observation of the lack of connection between adoption of ADR pledges and perception of organizational leaders' actual opinions, see *supra* text accompanying note 190.

210. See generally Meyer & Rowan, *supra* note 61.

professional leaders about ADR relative to their opinions about how well the court system has been working.²¹¹

Overall, the findings in this Part suggest that respondents have a keen sensitivity to the apparent views of their organizational and professional leaders and that respondents' own views are significantly related to the perceived views of their leaders. Organizational policies promoting ADR use, however, do not seem to be related to respondents' belief in mediation.

VII. SUMMARY: SIMILARITIES AND DIFFERENCES IN OPINIONS ABOUT ADR BETWEEN THE THREE TYPES OF RESPONDENTS

The three types of respondents have generally similar patterns of belief about mediation, though with some important differences. Certainly, there is much greater congruence of views about ADR by the three types of respondents than about litigation, regarding which their views differ sharply.²¹² Indeed, many of the differences between the three types of respondents involve relative assessments of ADR as compared with litigation in which ADR is not used.

Much of the information that all three types of respondents have about ADR came from their own personal experience. In addition, substantial percentages of all three types of respondents said that they received "more than a little" information about ADR from attorneys. Substantial percentages of the outside counsel and inside counsel also said that they received more than a little information about ADR from ADR providers, professional publications, and continuing education programs; much smaller percentages of executives gave similar responses.

All three types of respondents generally do believe in mediation. The overwhelming majority of each group believes that mediation is appropriate in at least half of lawsuits involving a business. Although these findings indicate that outside counsel generally believe in mediation somewhat more than executives, this is largely a function of most outside counsel believing that mediation is appropriate in *more than half* the cases, whereas a larger percentage of executives believe that mediation is appropriate in *about half* of cases.

211. In multiple regression analyses that include several variables correlated with belief in mediation, executives' perceived opinions of professional leaders about ADR (both directly and relative to the court system) are not significantly related to belief in mediation. This suggests that the relationship between professional leaders' opinions and respondents' own opinions is somewhat indirect.

212. See Lande, *Failing Faith*, *supra* note 95, at 48-54.

While it is important to try to understand what accounts for this difference (as described in this article), this analysis should not obscure the overall similarity in respondents' belief in mediation. Indeed, there are relatively few significant differences between the three types of respondents regarding many specific opinions about mediation and ADR generally.

About three-quarters of all three types of respondents report satisfaction with their ADR experiences, both in terms of the process and results. Majorities of all three types of respondents believe that increased use of ADR by their firms or major clients probably would not affect them in terms of compensation, prestige, advancement, professional autonomy, or satisfaction with their work, with a few exceptions. Of those who do expect such consequences, substantial proportions believe that the changes would be positive. The most notable differences between types of respondents is that substantially greater proportions of inside counsel than outside counsel or executives believe that increased ADR use would improve their situations, particularly regarding prestige within their firms and opportunities to do satisfying work. Executives see ADR as providing significantly greater opportunities for autonomy from their lawyers than the lawyers see it as providing autonomy from their clients.

Most respondents have favorable beliefs about use of mediation in business disputes. About three-quarters of respondents believe that at least half of mediated cases are resolved in an appropriate time and at an appropriate cost. Over three-quarters believe that mediation helps preserve business relationships and two-thirds believe that mediators and arbitrators generally consider the needs and practices of particular business communities. There is a significant difference between types of respondents about whether businesses generally would be better off using the courts to resolve their disputes if ADR procedures took as much time and money as the courts. Pluralities of executives and inside counsel believe that businesses would be better off using the courts under those circumstances, compared with a majority of outside counsel who believe that ADR would still be preferable (though most do not believe that mediation does take as much time and money as the courts). The vast majority of all types of respondents believe that it is usually appropriate for businesses to try to find outcomes addressing the underlying interests of each party rather than seeking the largest possible concessions, though outside counsel said that it is appropriate to seek to meet underlying interests in more cases than executives did. The vast majority of all three types of respondents also said that in at least half of

business suits, it is appropriate to reach a settlement involving outcomes other than, or in addition to, monetary payments.

The overwhelming majority of respondents believe that top corporate executives are satisfied with the results of mediation in at least half of the cases. Overall, each type of respondent believes that their organizational superiors and the leaders of their professions have favorable views about ADR. Outside counsel believe that leaders in their profession have more favorable opinions about ADR than do the inside counsel and executives.

Although the three types of respondents have fairly similar views about mediation and ADR generally, there are more differences in the patterns of *factors that are (and are not) related to belief in mediation*. For all three types of respondents, most of the variables are not significantly correlated with belief in mediation. These include most factors relating to the respondents' personal backgrounds, litigation and ADR experience, opinions about litigation, amount of information about ADR received from various sources, expected personal consequences of increased ADR use, and the existence of policies in their firms to promote use of ADR.

There are two variables that are significantly correlated with belief in mediation for all three types of respondents. These are beliefs that mediation helps preserve business relationships and that business' top executives are often satisfied with the results of lawsuits where mediation is used.²¹³ In addition, for both outside counsel and inside counsel—but not executives—belief in mediation is significantly correlated with satisfaction with the process and results of their ADR experiences as well as perceptions about whether their organizational superiors have favorable opinions about ADR.²¹⁴

For outside counsel, belief in mediation is significantly correlated with quite a number of additional factors. These include amount of experience with ADR, both as a neutral and a partisan, as well as perceptions that: (1) court decisions are unpredictable, (2) litigation is a poor way to resolve disputes even if courts run quickly and efficiently, (3) businesses would be worse off using courts even if ADR

213. A third variable is also significantly correlated with belief in mediation for all three types of respondents, but it is essentially derivative of one of the other two variables. This third variable is an estimate of how often top executives are satisfied with results of mediation relative to an estimate of top executive satisfaction with litigation where mediation is not used.

214. Perceived favorable views about ADR by organizational superiors relative to their views about the court system is also significantly correlated with inside counsel's belief in mediation.

takes as much time and money as the courts, (4) ADR neutrals generally consider business needs and practices (particularly so as compared with the courts), and (5) cases in mediation are resolved within an appropriate amount of time and at an appropriate cost.

Performing a statistical multiple regression analysis using all the variables that are significantly correlated with belief in mediation for outside counsel²¹⁵ produces a model that explains a substantial 48% of the variance.²¹⁶ This model indicates that the variables that are most directly related to belief in mediation are: the belief that mediation helps preserve business relationships, the belief that litigation is a poor way to resolve disputes even if courts run quickly and efficiently, and the amount of ADR experience as a partisan. Thus, although economic factors such as perceived time and expense advantages of mediation are somewhat related to outside counsel's belief in mediation, this analysis suggests that qualitative factors such as the effect on business relationships and the nature of the litigation process are more directly related to outside counsel's belief in mediation. In addition, simply having more experience with ADR seems to lead to greater belief in mediation by outside counsel.

For inside counsel, belief in mediation is significantly correlated with their firms' more frequent status as plaintiffs in litigation, in addition to the variables mentioned above.²¹⁷ A multiple regression analysis using all the variables that are significantly correlated with belief in mediation for inside counsel²¹⁸ produces a model that explains 37% of the variance. The variables that are most directly related to belief in mediation by inside counsel are that top executives

215. The regression analysis did not include several "relative" variables, as this would cause inappropriate duplication and possible problems of multicollinearity. For discussion of multicollinearity, see NETER ET AL., *supra* note 100, at 687-92. The "relative" variables were constructed by subtracting a rating of a quality of litigation from the rating of the same quality in litigation where mediation or ADR is used. See *supra*, Part III. The "relative" factors excluded from the regression analysis involve satisfaction with the process and results of disputing experience, sensitivity to business needs and interests, and perceived satisfaction of top executives with dispute results.

216. This percentage of explained variance is the "adjusted R^2 ," which takes into account the number of variables in the model and is thus a more conservative measure than the unadjusted R^2 . See NETER ET AL., *supra* note 100, at 663-64.

217. For other factors significantly correlated with inside counsel's belief in mediation, see *supra* text accompanying notes 213-14.

218. The regression analysis generally did not include factors relative to comparable variables about litigation where the analysis included the factor without reference to the comparable variable about litigation. See *supra* Part III for description of ratings of ADR relative to litigation. The model *did* include perceived satisfaction of top business executives with mediation results relative to litigation in place of the direct

are more satisfied with the results of mediation than litigation and that inside counsel's organizational superiors have favorable opinions about ADR. This suggests that inside counsel's belief in mediation most directly reflects an identification with their superiors' views about ADR and litigation.

Executives' belief in mediation is significantly correlated with having a liberal political philosophy, the amount of information about ADR received from colleagues in their firm other than lawyers, perception that knowledge about mediation is more a matter of common sense than specialized skill and learning, and a perception that leaders in their profession have favorable views about ADR, in addition to the variables previously mentioned.²¹⁹ A multiple regression analysis of all the variables significantly correlated with belief in mediation for executives²²⁰ produces a model that explains 23% of the variance. The only factor in that model that is directly related to executives' belief in mediation in that analysis is the perception that top executives are more satisfied with the results of mediation than litigation. The perception that executives are satisfied with the results of mediation could reflect an interest in bottom-line results, attentiveness to authorities' desires, or both. It is noteworthy that most of the factors that are correlated with executives' belief in mediation do not relate particularly to dispute processing, but rather involve more general opinions and links to others in their networks. Consideration of these patterns in conjunction with executives' acid views about litigation²²¹ suggests that executives' belief in mediation may be a function, at least in part, of their desire to avoid the problems that they generally experience with litigation.

measure of perceived satisfaction with mediation results, because the correlation with the relative measure is stronger than with the direct measure.

219. For other factors significantly correlated with executives' belief in mediation, see text accompanying note 213, *supra*.

220. The regression analysis did not include factors relative to comparable variables about litigation where the analysis included the factor without reference to the comparable variable about litigation. See *supra* Part III for description of ratings of ADR relative to litigation. The model did include perceived satisfaction of top business executives with mediation results relative to litigation in place of the direct measure of perceived satisfaction with mediation results, because the correlation with the relative measure is stronger than with the direct measure.

221. See Lande, *Failing Faith*, *supra* note 95, at 51-52.

VIII. IMPLICATIONS ABOUT PROMOTING INCREASED USE OF MEDIATION

Part VIII.A uses the sociological theories presented in Part II.B to analyze why lawyers and executives believe in mediation. Part VIII.B describes strategies that proponents might use (or continue using) to promote increased use of mediation based on the analysis in this article.²²² Part VIII.C discusses some cautions in developing strategies for promoting mediation use.

A. *Why Business Lawyers and Executives Believe in Mediation*

The sociological theory of institutionalism²²³ helps explain the findings of this study about why business lawyers and executives believe in mediation. Perceptions that mediation helps preserve business relationships and that top corporate executives like mediation results are among the strongest correlates of belief in mediation, and these are the only ones that are significant for all three types of respondents in this study. This suggests that the process of coming to believe in mediation involves a process of conformity with the views of authority. Moreover, this belief becomes increasingly taken for granted rather than consistently being based on individualized calculation of the expected consequences of using mediation.

This is not to say that such calculation does not occur or is not related to belief in mediation. The qualitative interviews, especially with the attorneys, included numerous references to choosing mediation or other ADR procedures based on expected time and cost savings, among other considerations. In most legal disputes, the parties and attorneys presumably do make at least rough guesses about the consequences that are likely if they use mediation or not. The survey data indicate that for outside counsel, belief in mediation is significantly correlated with perceived time and cost advantages of mediation compared with litigation. For both inside counsel and outside counsel, belief in mediation is also strongly correlated with their level of satisfaction with their own experiences with ADR. Moreover, it is certainly rational for parties and attorneys to consider potential effects on key relationships described in this study in assessing appropriateness of mediation. This is all consistent with institutional

222. These strategies are not strictly limited to the research findings. For example, it makes sense to structure mediation in such a way as to satisfy business executives, even though belief in mediation is significantly correlated with satisfaction for both types of attorneys but not the executives as well.

223. See *supra* Part II.B.

theory suggesting that consideration of technical characteristics of an innovation plays a particularly important role in early stages of institutionalization.²²⁴

This study indicates that these individualized, experience-based calculations are not the only—or probably even the most—important factors in developing belief in mediation. The focus on preserving relationships, general satisfaction of top corporate executives, and significant correlation with perceived opinions of organizational and professional leaders all suggest that business lawyers' and executives' belief in mediation is institutionalized. Over time, lawyers and executives develop generalized opinions, typically that mediation is good and should be used, or at least considered, regularly.²²⁵ These general opinions are supported, and perhaps generated, by perceptions that choosing mediation promotes legitimacy in the eyes of organizational and professional leaders and perhaps judges and court administrators as well.²²⁶ Some judges are among the biggest fans of mediation²²⁷ and routinely order parties to use mediation in their courts. Even when a statute allows for a case-by-case assessment of appropriateness, such as in Florida, there are judges who refer all

224. See *supra* Part II.B.

225. McEwen observed similar, institutionalized, "taken-for-granted" beliefs about disputing in comparing one corporation that developed a systematic approach to using ADR with corporations that used it on a case-by-case basis, if at all:

[T]he greatest threats to the effective use of mediation to produce higher quality, more timely, and cost efficient resolution of disputes come not from an "adversarial culture" but from the fact that frequently lawyers and their clients are trapped by the routines, incentives, and traditional expectations of legal and business practice. What frees lawyers and clients from these routines and their accompanying expectations is not the use of mediation processes alone. Rather it is new ways of thinking systematically about disputes that are made possible by taking on new roles as managers of disputing with clear objectives to manage toward and by self-consciously accepting mediation principles as the default framework for assessing conflicts.

McEwen, *supra* note 119, at 25-26.

Presumably after a period of self-conscious innovation, mediation principles have or will become the new taken-for-granted institution of disputing in that corporation. See generally Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AMER. SOC. REV. 273 (1986).

226. The fact that mediation referrals are authorized by statute in states like Florida and Massachusetts, see generally ROGERS & McEWEN, *supra* note 20, at §6:04, endows mediation with significant legitimacy. DiMaggio and Powell use the term "coercive isomorphism," referring to modeling based on government rules or practices. DiMaggio & Powell, *supra* note 59, at 150-51.

227. See e.g., Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 365-66 (1992).

their cases to mediation and do a review only if requested by the parties.²²⁸ Indeed, in some places, the use of mediation has become so routine and accepted that lawyers do not wait to be ordered into mediation but initiate it themselves.²²⁹

Observations and accounts of the process of "getting the faith" in mediation also support the explanation of an institutionalization process. There seems to be a general pattern in which attorneys initially resist new mediation programs, and then, in relatively short order, become some of the biggest proponents for mediation use.²³⁰ Indeed, it has become something of a ritual at continuing legal education programs for "converts" to mediation to give testimonials about how they initially balked at using mediation, but how they are now satisfied believers who use it as often as possible and appropriate.²³¹ Clearly, these "conversions" are based on experience, which presumably provides opportunities for comparison of litigation with and without mediation. However, the sharp shifts in avowed belief from skeptic to

228. Email from Sharon Press, Director, Florida Dispute Resolution Center (Sept. 7, 1999) (on file with author).

229. In Hennepin County (Minnesota), lawyers view Supreme Court Rule 114 as mandating use of ADR, usually mediation. A preliminary study based on 12 in-depth interviews with Hennepin County lawyers found that as a result of Rule 114, "[t]here may be less lawyer-to-lawyer negotiation" as lawyers prefer to "wait for a 'mandatory' mediator's assistance with settlement." Barbara McAdoo & Nancy Welsh, *The Times They Are a Changin'—Or Are They? An Update on Rule 114*, HENNEPIN LAW, July-Aug. 1996, at 8.

230. See, e.g., McEwen et al., *supra* note 87, at 177 (quoting an attorney, "When we first began mediating, I think there was a lot of resistance. . . . But I do think that over time we've all become acclimated to it."); Leonard Edwards, *Dependency Court Mediation: The Role of the Judge*, 35 FAM. & CONCILIATION CTS. REV. 160, 160 (1997) (anticipating regular resistance to new dependency mediation programs).

231. I recently observed two experiences of such testimonials at professional continuing education programs: Edwin L. Lowther, Jr., To Prepare for Mediation is to Prepare for Trial, Remarks at the meeting of the Arkansas Bar Association (June 11, 1999) (a defense attorney described his change in approach from using mediation only when clients insisted to using it whenever it is appropriate); Michael R. Mayton, Remarks at the Panel Discussion on Mediation at the 13th Annual Workers' Compensation Educational Conference of the Arkansas Workers' Compensation Commission (Aug. 26, 1999) (a self-described former skeptic stated that he is now "an advocate" for mediation).

This study highlights the important role that attorneys play as disseminators of information about ADR. All three types of respondents indicated that attorneys are important sources of information for them, especially for the executives. For the attorneys, professional information channels such as professional publications and continuing education programs are also important sources of information. Although this study did not find that belief in mediation is significantly correlated with the amount of information about ADR that respondents received, I suspect that repeated messages through professional communication channels play an important part in the institutionalization process, as suggested by institutional theory.

strong proponent suggest that the conversions are more a function of a change in perceived legitimacy of dispute resolution procedures than careful calculation of advantages and disadvantages. Obviously, the purpose of such public testimonials at professional gatherings is to legitimize mediation in order that others may make similar conversions in belief and practice.

Over time, repeated exposure to public and private testimonials, as well as the mediation process itself, transforms mediation from an innovation into a routine part of the disputing practice that becomes taken for granted as the (currently) normal way of doing things. After the mediation innovation has become institutionalized for a time, it becomes difficult to conceive of alternative arrangements, and even those who initially resisted the innovation are likely to resist changing a new status quo.²³²

Also consistent with institutional theory, but contrary to several theories of the professions, this study suggests that belief in mediation is not related to perceived self-interest of key professionals. All three types of respondents generally believe in mediation and do not believe that increased ADR use would affect them much; moreover, belief in mediation is not significantly correlated with any of the five types of professional interest measured in this study. This suggests that belief in mediation is more related to attorneys' and executives' definitions of their appropriate roles and functions than calculations of their own self-interest.

Contrary to both institutional theory and theories of the professions, business lawyers and executives generally do not believe that mediation involves a high degree of specialized skill and knowledge, and belief in mediation was not correlated with perceptions of mediation as involving such specialized knowledge. For the executives, this might be readily explained as a reaction against perceptions of excessive specialization and mystification of litigation. This explanation could also fit for the attorneys, who may also be frustrated with litigation, though this explanation does not fit as well for the generally experienced attorneys in this study who presumably have become comfortable with litigation.

232. This seems like an inevitable part of institutionalization of innovations. After innovations become routine, it is hard to imagine how people lived without them (e.g., indoor plumbing, telephones, TV, faxes, email, etc.) or going back to the days before the innovation became institutionalized. I have seen this process in the Mediation Program that I direct at the University of Arkansas at Little Rock School of Law. After operating for about 18 months, some people who initially resisted using mediation have "warmed up" to it and accepted it as part of their regular practice, sometimes even requesting it themselves.

B. *Strategies for Mediation Proponents*

Certainly, just believing in mediation is not sufficient to increase mediation use. For one thing, decisions to use mediation generally require agreement of a number of people. In contractual mediation (i.e., without court order) many of the people who will decide whether to use mediation may be angry at each other or perceive that they have conflicting interests about using mediation. Court-ordered mediation requires agreement of policymakers and officials to institute and implement a program faithfully. In addition, individuals may be ambivalent, believing in mediation in theory but being reluctant to use it in practice. Respondents described the familiar “not in my case” reaction of ostensible mediation believers when presented with opportunities to mediate their cases.²³³ Nonetheless, I do believe that having favorable opinions about mediation is probably an important (though obviously not determinative) factor in decisions to actually use it.²³⁴

Starting on a behavioral level, this study suggests that providing lawyers with experience with mediation should be an effective strategy to promote belief in mediation. This is the “try-it, you’ll-like-it” rationale of statutes that authorize courts to order cases to mediation.²³⁵ These programs force attorneys and parties to overcome inexperience with mediation and resistance to change. This is especially salient for attorneys who may regularly have cases to mediate. This study suggests that repeated experience of parties—and especially attorneys—with mediation may be a successful strategy in promoting increased use of mediation, at least in the short term.²³⁶

233. See text accompanying note 125, *supra* (containing an attorney’s description of a situation where clients who say that they favor ADR decline to use it in specific cases); text accompanying note 190, *supra* (describing an attorney’s observation that top executives sometimes sign a pledge to use ADR, but are unwilling to use it in their own disputes).

234. This relates to an issue in social psychology about the relationship between attitudes and behavior and whether a favorable attitude is necessary to change behavior. In some situations, changes in attitudes may occur only *after* changes in behavior. For example, racial attitudes may change only after people experience a non-discrimination regime for an extended time. See Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutional Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 47-48 (1992). Thus, I do not suggest that a favorable mediation ideology is absolutely necessary to change behavior regarding mediation use, but it may be an important factor in some situations.

235. See ROGERS & McEWEN, *supra* note 20, at §6:04.

236. It is worth noting that the correlation between amount of experience with ADR and belief in mediation is statistically significant only for the outside counsel. This may be because this group has had the most experience with ADR and thus the most exposure to the institutionalization process. If inside counsel and executives

When parties—and especially attorneys—use mediation, it is important that they be satisfied with the results and process. Not surprisingly, many factors associated with satisfaction²³⁷ are the same as those correlated with belief in mediation. Many of these factors involve improving or building key relationships.²³⁸ For example, for all three types of respondents, satisfaction is highly correlated with beliefs that mediation helps preserve business relationships, that mediators and arbitrators generally consider the needs and practices of particular business communities, that business' top executives are often satisfied with the results of mediation, and that businesses generally would be worse off using the courts to resolve their disputes even if ADR procedures took as much time and money as the courts.²³⁹ Economic factors are also quite significantly correlated with satisfaction for the attorneys, especially the inside counsel. This includes perceptions that suits in mediation are often resolved at an appropriate cost and especially that they are resolved within an appropriate amount of time. For executives, these time and cost considerations are not quite significantly correlated with satisfaction, though the correlation with perceived appropriateness of cost is considerable. Relational factors are related to belief in mediation both indirectly—as factors related to satisfaction with ADR experience (which is in turn related to belief in mediation for both types of attorneys)—as well as directly as ideological factors in their own right. In sum, mediators and mediation program administrators intent on expanding their market are (not surprisingly) well advised to focus on

have increased experience with mediation, it seems plausible that their belief in mediation would increase as well. For some cautions about a strategy of mandating mediation, see *infra* Part VIII.C.

237. In the following discussion, for convenience, "satisfaction" refers to satisfaction with both the process and results of mediation.

238. This is somewhat similar to the findings of McEwen and his colleagues, who found that attorneys in Maine came to support divorce mediation because it helped them manage their relationships with their clients and opposing parties, and, indeed, to manage their practices generally. They found that divorce mediation helped attorneys reconcile the following dilemmas:

[H]ow to pursue both negotiation and trial preparation; how to encourage client participation in case preparation while retaining one's professional authority; how to provide clients with legal advice while addressing vitally important non-legal issues; and how to structure and manage cases so that they can be moved predictably and expeditiously.

McEwen et al., *supra* note 87, at 150.

239. For executives, some of these correlations are somewhat substantial ($r = .25$ or more), but not quite statistically significant because of small sample sizes. Questions about satisfaction with ADR experience were asked only of respondents who said that they had any personal experience with ADR, which was true for only 25 of the 60 executives.

satisfying their customers, which entails providing an efficient and timely dispute resolution service and being especially attentive to the relational needs of the participants, particularly top executives in business disputes.

This research also highlights an interesting set of interactions that may be important for promoting mediation. This study shows that attorneys are key sources of information about ADR for colleagues and clients alike. It also indicates that both outside counsel and inside counsel are generally very sensitive to the perceptions and desires of their clients and superiors regarding dispute resolution. Thus, there may be cyclical exchanges in which attorneys provide information and superiors provide values and direction about handling disputes. Given the significance of the findings regarding concern for superiors' and top executives' opinions as factors related to belief in mediation, increasing consultation about use of dispute resolution procedures could promote belief in (and thus perhaps use of) mediation. Some business firms and law firms have signed pledges that their firms will consider using ADR for handling their disputes.²⁴⁰ The existence of these policies is not significantly correlated with belief that organizational superiors have favorable opinions about ADR for any of the three types of respondents.²⁴¹ Depending on how these pledge policies are implemented, they may not stimulate routine consultation between attorneys and clients about using mediation or other forms of ADR in particular disputes. It seems plausible that such routine consultation about dispute resolution procedures would increase superiors' awareness of the mediation option and increase attorneys' sensitivity to the superiors' concerns and ways that mediation might address those concerns.²⁴² Laws and professional responsibility rules mandating that attorneys routinely discuss ADR

240. See *supra* note 22 and accompanying text.

241. In these cynical times, the existence of such organizational pledges may be seen as symbolic substitutes for concrete actions for some firms and executives that want to appear legitimate by "jumping on the ADR bandwagon" but who are not (perceived to be) true believers. See generally Pfeffer, *supra* note 67; Meyer & Rowan, *supra* note 61. The significant correlations to perceived actual beliefs of superiors and executives suggest that business lawyers and executives may be especially tuned into what they believe are the actual beliefs and are not "taken in" by "mere" symbolic actions.

242. This study clearly finds that attorneys' sensitivity to executives' concerns and the belief that mediation addresses executives' concerns are related to the attorneys' belief in mediation. It does not, however, find that the amount of information that executives get from attorneys is related to the level of the executives' belief in mediation. Such a connection would provide evidence of a mutually reinforcing cycle in which attorneys' provision of information and executives' expression of concerns

options with clients may also contribute to increased belief in and use of mediation.²⁴³

This study suggests that arguments simply or primarily appealing to the direct self-interest of attorneys and executives would not seem to be effective in instilling belief in mediation or increasing their use of mediation. This is somewhat surprising both because people are often believed to operate on self-interest and because many lawyers, in particular, are often perceived initially to resist introduction of mediation out of fear of loss of income. The lack of significant correlations between belief in mediation and the variables involving professional self-interest may be due to the fact that most respondents said that they did not expect much effect from increased ADR use. If they believed that they had more to gain or lose, there might be a significant connection between the two.

One might cautiously extend these findings beyond the intra-organizational context of business disputes. In many jurisdictions, mediators and others want to build a market for mediation of legal disputes and/or a court-annexed mediation program. The findings in this study suggest that for these efforts to generate belief in mediation by the rank-and-file professionals who serve as case gatekeepers and dispute handlers, it may be important to gain support from authorities comparable to top business executives. In court, judges are the preeminent authorities. If influential judges are seen as supporting the market or program, then lawyers, court administrators, and others necessary for smooth functioning of litigation are likely to believe in them too.²⁴⁴

Mediation promoters often have a good intuitive understanding of the importance of enlisting the support of judges, lawyers, and other key professionals. For example, the Arkansas General Assembly recently passed a law authorizing courts to order parties to mediate cases involving "parenting issues"²⁴⁵ and the Arkansas Conflict

would increase both sides' belief in mediation. Nonetheless, even a one-way transmission from executives to attorneys may contribute to an institutionalization of mediation, if done on a regular basis.

243. A number of states have adopted rules requiring attorneys to discuss ADR options with clients, either as rules of civil procedure or professional responsibility. See ROGERS & McEWEN, *supra* note 20, at §4:03. Discussion of the policy merits of such rules is beyond the scope of this article.

244. See generally Edwards, *supra* note 230. For this reason, it would be useful to study factors associated with judges' belief in mediation. Although there have been studies of judges' opinions about ADR, see, for example, Folberg et al., *supra* note 227, it would be helpful to do multivariate analyses to better understand the logic of the judges' thinking.

245. See Act of Mar. 18, 1999, §1, 1999 Ark. Laws 704.

Resolution Association is developing a strategy to promote such court-ordered mediation primarily through contacts with lawyers and especially judges.²⁴⁶ The Association of Family and Conciliation Courts sponsored two colloquia on child protection and dependency mediation that highlighted the importance of getting the backing of the juvenile court judges to get approval and continuing support for dependency mediation programs. Santa Clara County (California) Judge Leonard Edwards, a longtime leader in the field, highlighted the importance of having professionals talk with others in the same profession. He has found that judges are most persuasive to other judges, lawyers for other lawyers, child protection officials with other such officials and so on.²⁴⁷ This study supports the logic of these strategies.

C. *Cautions About Institutionalization of Mediation*

While belief in mediation seems to be fairly widespread among business lawyers and executives like those in this study, this belief may not be extremely deep. It is relatively easy for a respondent to tell a researcher that mediation should be used often; it requires something more to act on that belief in the face of other influences. It is worth noting that most respondents in this survey had relatively limited experience with ADR during careers that spanned a median of 11-12 years for the attorneys and 22 years for the executives. During that time, only 32% of the outside counsel, 13% of the inside counsel, and 2% of the executives had participated as a partisan in more than 20 ADR proceedings. Almost two-thirds of the executives (62%) had no experience as a partisan in ADR at all. Certainly it is not necessary to have a lot of experience to believe in mediation. Indeed, after one or two positive experiences, some people may become "true believers" and proselytize its use quite broadly. Nonetheless, most respondents' limited ADR experience could raise doubts about the depth of commitment to their beliefs in mediation, on the theory that if they were truly committed to mediation, they would have decided or recommended to use it more often.

This is difficult to analyze because no one in these business disputes can make decisions unilaterally. If mediation is not ordered by

246. See Arkansas Conflict Resolution Association membership meeting (Aug. 21, 1999). See also *Selling ADR to Judges*, Annual Conference of the Society of Professionals in Dispute Resolution (Oct. 15, 1998).

247. Leonard Edwards, Remarks made at Luncheon Speech, Child Protection and Dependency Mediation Colloquium, Association of Family and Conciliation Courts (Apr. 17, 1999).

a court, attorneys are dependent on clients' willingness to mediate, executives are dependent on attorneys presenting ADR procedures as plausible options, and each side in a dispute is dependent on the other's interest in mediation. Having said all that, the limited use of ADR leaves lingering questions about the depth of individual and organizational belief in mediation.

If key decision-makers are not truly committed to mediation, procedures described in Part VIII.B may not be effective in institutionalizing mediation. Parties and attorneys who do not believe in mediation can certainly find ways to evade and subvert mandates for consultations about ADR and attendance at mediations. They can "go through the motions" of having consultations and attending mediations without seriously intending to consider ADR or to engage in mediated negotiations. Thus, while such requirements may be helpful in institutionalizing mediation, they are certainly no guarantee that parties and attorneys will follow them faithfully.²⁴⁸

However deep the commitment to mediation of those who have "gotten the faith," mediation proponents should be concerned about key decision-makers *keeping* the faith. While mediation may be "trendy" today, it may well be replaced or supplanted by some new dispute resolution fashion.²⁴⁹ While it appears that ADR is still in vogue as of this writing, there is no guarantee that it will remain so indefinitely. With the rapid pace of change in today's highly developed world, we have lived through de-institutionalization of icons that were widely seen as permanent fixtures in their day. In business, consider that IBM and AT&T were once considered virtually monopolistic titans. While these companies still exist today, they are now mere shadows of their former selves, and it would not be surprising if they became swallowed up entirely in a future merger or acquisition. In politics, although President George Bush had astronomical approval ratings in the public opinion polls after the Persian Gulf War and was considered by many to be a "shoo-in" for re-election, he was not re-elected. *Newsweek* magazine's "conventional wisdom

248. Kimberlee Kovach has proposed the establishment of a good faith requirement for participation in mediation. Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL., Winter 1997, at 9. While I am sympathetic to the goal of her proposal, I am skeptical that it would be effective and I worry that it would be counterproductive. See Edward F. Sherman, 'Good Faith' Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL., Winter 1997, at 14.

249. See text accompanying note 125, *supra* (relating an attorney's observation that ADR was trendy recently but has been "replaced by some newer and trendier set of initials").

watch" feature is a weekly reminder of the fickleness of public opinion. One could go on and on about the "here today, gone tomorrow" life cycle of many prominent institutions. This study finds that some of the strongest and most direct correlates of belief in mediation are perceptions of the views of corporate executives and organizational superiors, as well as effects on business relationships. Views of mediation by executives—who typically have little or no personal experience with mediation—could easily change. Thus, if mediation or ADR eventually turns out to be the dispute resolution equivalent of the hula hoop, one should not be too surprised.

My hunch is that mediation won't be a dispute resolution hula hoop, at least in the near term. I expect that mediation will continue to grow, at least for a while, because it is flexible enough to address the interests of key decision-makers in disputes, particularly in comparison with its primary rivals, litigation and arbitration. In a highly competitive global economy, businesses are likely to continue to value maintaining good relationships with commercial partners and individual customers alike. Mediation clearly has greater potential for preserving relationships than litigation and arbitration. Mediation also has the potential to provide cheaper and faster resolution of disputes and to tailor the timing of the process to the needs of the parties and attorneys. It also has the potential to provide results that participants believe are fair.²⁵⁰ The perceived failure of litigation to perform well in this respect is the heart of the criticism of litigation by the executives in this study.²⁵¹ This study finds, like most other surveys of mediation users, that the vast majority are highly satisfied customers.²⁵² Thus, mediation has the potential to provide better and more efficient performance than its competitors, which could prompt people to maintain or increase their use of mediation.

I keep referring to the *potential* of mediation because "it" is extremely malleable and it is quite possible—perhaps even likely—that processes called "mediation" will evolve over time. For one thing, "it"

250. See Esser, *supra* note 2, at 529, 532-533. The RAND Report found that litigants and especially the attorneys in mediation generally believe that the outcome and process of mediation was fair in their cases. KAKALIK ET AL., *supra* note 119, at 369, 404. The attorneys and litigants whose cases were not mediated gave responses that were not significantly different from those who went through mediation. See *id.* at 305-10.

251. See Lande, *Failing Faith*, *supra* note 95, at 26-35. This study suggests that executives' dissatisfaction with litigation is significantly based on doubts about the ability of litigation to reasonably find the truth. If people believe that mediation fairly gets at the truth, this could be a factor related to belief in mediation. This was not measured in this study or any other I have seen.

252. See Esser, *supra* note 2, at 529, 532-533; McEwen, *supra* note 2, at 182.

is currently a collection of various procedures in diverse settings with some common features and a lot of variability.²⁵³ Studies of other institutionalization processes suggest that there are likely to be “isomorphic” pressures that might lead to the dominance of certain forms of mediation and perhaps the extinction of others as the mediation field becomes increasingly standardized.²⁵⁴ The 1980s and 1990s saw the proliferation of “standards of practice” for mediation and ADR.²⁵⁵ At this writing, a Uniform Mediation Act and a Model Rule of Professional Conduct for Lawyer-Mediators are being drafted.²⁵⁶ These and future efforts at regulation are likely to increase the standardization and decrease the diversity of mediation practices. In many ways, I believe that such standardization, if done wisely, would be a good thing. It should reduce the incidence of poor mediation practices, improve communication between mediation buyers and sellers, and provide for more predictable interactions and results from mediation.

The push for standardization can also produce some undesirable effects that are essentially the “flip side of the same coin.” As the mediation field settles into a smaller number of legitimate patterns, it may become increasingly difficult to innovate. Some of the difficulty may be due to regulatory limitations, though probably more of it will come from normal organizational dynamics. As mediation becomes a routine way to handle substantial volumes of cases, there may be little perceived need, incentive, or legitimacy to consider alternatives. Over time, practices may be perpetuated simply because

253. For a minimalist definition of mediation, see Lande, *supra* note 1, at 839 n.1. For a description of some of the variation in mediation styles and goals, see *id.*, at 845-57. See also MOORE, *supra* note 13, at 41-53 (outlining typology of mediation, including “social network,” “independent,” and three varieties of “authoritative” mediation: “benevolent,” “administrative/ managerial,” and “vested interest” mediation).

254. See generally, DiMaggio & Powell, *supra* note 59. For a fascinating study illustrating the standardization of practices in venture capital financing of Silicon Valley computer businesses, see Suchman, *supra* note 54.

255. For a collection of several sets of such standards, including the Model Standards of Conduct for Mediators adopted by the American Bar Association, American Arbitration Association, and the Society of Professionals in Dispute Resolution, see MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 159-185 (1996).

256. See Section of Dispute Resolution, American Bar Association & National Conference of Commissioners On Uniform State Laws, Uniform Mediation Act (visited Sept. 1, 1999) <<http://www.stanford.edu/group/sccn/mediation/>>; CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule of Professional Conduct for The Lawyer as Third Party Neutral* (visited Sept. 1, 1999) <<http://www.cpradr.org/cpr-george.html>>. For other indicators of trends toward standardization of mediation, see Lande, *Failing Faith*, *supra* note 95, at 62-63.

"that's the way they have been done around here," rather than because the practices satisfy the interests of the parties or mediation program sponsors.²⁵⁷ This tendency to rely on shortcut routines may be aggravated if there are pressures to speed up handling of an ongoing volume of cases with limited resources. A speed-up accompanied by routinization is especially likely to occur in court-sponsored programs, given the (current) limited political support in the U.S. for government spending and a general tendency of government programs to be regulated by a set of rigid legal regulations. Under such circumstances, careful individualized attention to parties and cases may give way to impersonal mass production of mediation services that do not provide the benefits that mediation processes originally offered. Indeed, over time, mass-produced mediation, particularly when done in the context of litigation, may come to resemble litigation so much that "it" loses its distinctive quality as an alternative to "normal" litigation.²⁵⁸ The history of arbitration in the twentieth century provides a cautionary example of how dispute resolution innovations can become so rigidified and legalized as to lose their perceived advantages.²⁵⁹ If institutionalization of mediation takes a similar course, one can expect that the next generation will look for alternatives to alternative dispute resolution and its current "rising star," mediation.

Thus, for key supporters of mediation to maintain belief in mediation, mediation program administrators and mediation proponents need to be regularly attentive to evolving interests and circumstances and prepared to change mediation practices accordingly. This may be a difficult challenge if key supporters are unwilling to consider changes because they are stuck on a particular institutionalized form of mediation, or if they lose so much faith in mediation that they would prefer to adopt a new innovation rather than fix problems with

257. See Tolbert & Zucker, *supra* note 65, at 22 (arguing that after innovations become institutionalized, continuation is based more on the innovations' value in providing legitimacy than improving performance).

258. See Lande, *supra* note 1, at 845-49 (describing "liti-mediation" culture where "it has become taken for granted that mediation is the normal way of ending litigation"); Lande, *Failing Faith*, *supra* note 95, at 64 (arguing that if ADR becomes sufficiently integrated into litigation, ADR may lose its distinctive advantages, possibly prompting loss of confidence in both ADR and litigation).

259. See Lande, *Failing Faith*, *supra* note 95, at 62 n.183. In this study, I also asked respondents how often they believe that binding arbitration is appropriate in lawsuits involving a business. All three types of respondents had less belief in arbitration than in mediation, especially both types of attorneys, who have been particularly soured on arbitration.

mediation as it has become institutionalized.²⁶⁰ I believe that it is possible to maintain openness to new innovations within mediation practices if mediation practitioners and programs incorporate effective quality control systems.²⁶¹ Experience with institutionalization of other ideas, practices, and ideologies suggests that mediation proponents should be humble and realistic in expectations of overcoming predictable rigidification that is often part of institutionalization processes.

IX. CONCLUSION

This study suggests that business attorneys' and executives' belief in mediation is on an ideological, not simply a technical, level. These professionals identify themselves in such categories as skeptics, believers, and advocates. While technical characteristics of rival dispute resolution procedures certainly factor into the professionals' ideologies, it seems clear that the ideologies transcend rational technical analyses of optimal modes of handling disputes. Rather, belief in mediation takes on the character of a moral value. For believers, it represents a "best practice," not only in producing technically superior outcomes but of being the "right thing to do."

In Part II.A, I suggested that there is a "process pluralist" ideology and that a key element of this ideology is the belief in the legitimacy of a multiplicity of disputing procedures such as mediation, arbitration, and a host of procedures specific to particular organizations and industries as well as to litigation in government courts. From the data in the present study, it is hard to assess the extent to which respondents hold such an ideology. Thinking about how one might measure the ideology is helpful in trying to conceptualize the essence of it—and even whether any such coherent ideology really exists at all. For example, to establish such an ideology, must belief in mediation be correlated with belief in arbitration? (It turns out

260. The ADR movement itself is, to some extent, an example of an effort to adopt an innovation rather than fix underlying problems with the court system. Similarly, a shift in popularity from arbitration to mediation is another example of abandonment (by some) of an old innovation in favor of a new one.

261. I agree with Sharon Press, Director of the Florida Dispute Resolution Center, who warns against "ossification" of what should be the flexible process of mediation and argues that authorities have an ongoing obligation to routinely and systematically review their policies, rules, and procedures. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 910 (1997). Even if these are kept current, institutionalization poses the risk that, over time, official answers to questions will simply be, "That's what the rule says—we have no flexibility in this area." *Id.* at 916.

that the correlation is not statistically significant for the respondents in this study.²⁶²) That seems too rigid a measure, as people may have different relative preferences for various dispute resolution procedures but still generally agree that there are a variety of procedures that may be appropriate in various cases. For example, the attorneys (especially outside counsel) in this study tend to believe in mediation more than the executives, who tend to believe in arbitration more than the attorneys. Nonetheless, all three types of respondents believe that both procedures are frequently appropriate, which seems to get closer to the heart of such an ideology. Does the openness to a multiplicity of dispute resolution procedures require acceptance of the full panoply of procedures, including relatively rare or esoteric species such as summary jury trials, med-arb, and baseball arbitration? To be a process pluralist, must one accept litigation as a legitimate dispute resolution procedure?²⁶³ Going beyond acceptance of diverse dispute resolution procedures, does process pluralism require acceptance of plural norms, remedies, professional roles, or negotiation styles,²⁶⁴ as I suggested at the outset?

These questions are beyond answer in the present study. For one thing, if such a complex ideology exists, it is more likely to exist among ADR professionals than business lawyers and executives, as ADR is not a central concern for the latter. Even among ADR professionals, there is such diversity of opinion within the ADR field at this intermediate stage of institutionalization that a widely shared and coherent ideology may not have coalesced yet. If such an ideology does coalesce and diffuse through society, it may have an important impact on organizational and professional life as well as the operation of the legal system. Thus, it bears further scrutiny.

Whether or not a complex process pluralist ideology now exists (or is in the process of coalescing), this study shows that a simpler ideology favoring use of mediation does exist and is widely held among business lawyers and executives. Is belief in mediation like belief in magic or the market? The notion of faith suggests a powerful acceptance that is very difficult, if not impossible, to shake. Listening to the attorneys and executives interviewed for this study (as

262. For this purpose, belief in arbitration is defined similarly as belief in mediation, i.e., how often arbitration is considered to be appropriate in disputes involving a business.

263. If so, most executives in this study need not apply. See Lande, *Failing Faith*, *supra* note 95, at 51-52.

264. In particular, does it require acceptance of—or preference for—interest-based approaches to negotiation?

well as speakers at professional gatherings and in informal conversations), there clearly is a substantial minority of lawyers who identify as “true believers,” with a strong faith in the value of mediation. This study suggests that this group may constitute 15 to 40 percent of the attorneys, depending on how faith is defined and which set of attorneys is involved.²⁶⁵ Whether such faith in mediation (or magic, God, or the market) is justified—or is a convenient illusion—depends on the perspective of the observer. We cannot know whether faith in and practice of mediation in the future will have the staying power that magic, God, the market, or hula hoops have had. For the institution of mediation to persist over an extended time, presumably there need not be a consensus or even a majority of key actors with strong faith in mediation, only a critical mass.

Perpetuation of the institution also probably requires a larger body of believers who sustain some belief, albeit weaker and more qualified than the true believers. At this point (or at least when the interviews for this study were conducted), most attorneys and executives seemed to have this weaker form of belief in mediation. Will these qualified believers become converts to a faith in mediation, lose whatever confidence they now have, or pretty much hold pat? This study suggests that the flow of signals about mediation through professional and organizational networks is likely to be critical in future diffusion (or contraction) of the ideology and the intensity of belief of its adherents. Recent trends of institutionalization of mediation at this moment in history seem encouraging for proponents of mediation. This study suggests approaches that mediation proponents might use to extend the institutionalization of mediation. Experience with institutionalization of other practices suggests that proponents should be careful to avoid the dysfunctions that frequently accompany “successful” institutionalizations.

265. See *supra* note 121 and accompanying text.

APPENDIX 1

As noted in Part III, *supra*, respondents were selected from four states and those states were selected based on measures of the strength of the “ADR culture” of the states. Florida was considered to be a state with a “strong ADR culture” whereas Pennsylvania and Tennessee were considered to have “weak ADR cultures.”²⁶⁶ Thus, the results of the statistical analyses were the initial ratings of state ADR culture. The survey results support experts’ observations of distinguishable state *mediation* cultures, though not a general state ADR culture.²⁶⁷ The Floridians in the survey believe that mediation is appropriate more often than do residents of the other states. Sixty-six percent of Florida residents said that mediation is appropriate in more than half of cases (see Table 12). This compares with 51% of Massachusetts residents, 45% of Tennessee residents, and 41% of Pennsylvania residents giving these responses. Like Florida, Massachusetts was considered to have a strong ADR culture. The average response for Florida residents is significantly greater than for Tennessee and Pennsylvania residents. The average for Massachusetts residents is in between those for Florida on the high end and Tennessee and Pennsylvania on the low end, but not significantly different from these three states. This suggests that Massachusetts might be better described as having a medium mediation culture. Since this research did not find that Florida or Massachusetts residents displayed greater belief in arbitration than residents of Pennsylvania

266. For description of the procedure for initially assessing strength of state ADR culture, see Lande, *Failing Faith*, *supra* note 95, at 69-70.

267. As noted in Part III, *supra*, the notion of ADR culture has been used as a device to select respondents and control for statewide geographical differences. Although some of the findings of this research are consistent with the designations of mediation culture, based on these results it is impossible to say what differences between the states account for different attitudes. Part of this uncertainty may reflect confusion about definitions of mediation (or ADR or legal) culture. Kritzer and Zemans, *supra* note 95, at 538, note that the definition of local legal culture might (or might not) incorporate norms and attitudes that grow out of formal rules and structural factors (such as caseload characteristics) as well as “residual” beliefs not traceable to rules or structures. Observed geographical differences in attitudes and behavior about mediation could reflect variations in any or all of these classes of factors. Indeed, whether the determinative factors might be considered as “cultural” is itself uncertain at this point. What we can say now with some confidence is that these findings are consistent with a mediation culture hypothesis, and that the multivariate analyses controlling for these geographical differences enhance confidences in other independent variables, explaining the observed variation. See Lande, *Ideology of Disputing*, *supra* note 95, at 182-83. Recognizing the uncertainty about the nature of the geographical differences as structural or cultural, they will nonetheless be referred to as mediation culture for convenience.

and Tennessee, it would be more accurate to refer to this phenomenon as *mediation* culture rather than *ADR* culture.

Table 12. Belief in Mediation by State					
Proportion of cases	Florida	Mass.	Tennessee	Penn.	Total
Less than half*	11	23	23	24	21
Half*	23	26	32	35	29
More than half*	66	51	45	41	50
Total	100	100	100	100	100
Average (on scale from 0 to 10)	6.9	6.0	5.5	5.5	5.9
Number of respondents	44	47	47	51	189

*percentage of respondents saying that mediation is appropriate in various proportions of lawsuits involving a business

